SECTION B

FEDERAL COMMUNICATIONS COMMISSION



FACT SHEET

May 1998

CABLE TELEVISION FACT SHEET

PUBLIC, EDUCATIONAL, AND GOVERNMENTAL ACCESS CHANNELS ("PEG CHANNELS")

Pursuant to Section 611 of the Communications Act, local franchising authorities may require cable operators to set aside channels for public, educational, or governmental ("PEG") use.

Public access channels are available for use by the general public. They are usually administered either by the cable operator or by a third party designated by the franchising authority.

Educational access channels are used by educational institutions for educational programming. Time on these channels is typically allocated by either the franchising authority or the cable operator among local schools, colleges and universities.

Governmental access channels are used for programming by organs of local government. In most jurisdictions, the franchising authority directly controls these channels.

PEG channels are not mandated by federal law, rather they are a right given to the franchising authority, which it may choose to exercise. The decision whether to require the cable operator to carry PEG channels is up to the local franchising authority. If the franchise authority does require PEG channels, that requirement will be set out in the franchise agreement between the franchising authority and the cable operator.

Franchising authorities may also require cable operators to set aside channels for educational or governmental use on institutional networks; i.e., channels that are generally available only to institutions such as schools, libraries, or government offices.

Franchising authorities may require cable operators to provide services, facilities, or equipment for the use of PEG channels.

In accordance with applicable franchise agreements, local franchising authorities or cable operators may adopt on their own, non-content-based rules governing the use of PEG channels. For example:

- Rules may be adopted for allocating time among competing applicants on a reasonable basis other than the content of their programming.
- Minimum production standards may be required.
- Users may be required to undergo training.

Federal law permitted a cable operator to prohibit the use of a PEG channel for programming which contained obscene material, sexually explicit conduct, indecency, nudity, or material soliciting or promoting unlawful conduct. However, The U.S. Supreme Court determined that this law was unconstitutional. Therefore, cable operators may not control the content of programming on public

access channels with the exception that the cable operator may refuse to transmit a public access program, or a portion of the program, which the cable operator reasonably believes contains obscenity.

PEG channel capacity which is not in use for its designated purpose may, with the franchising authority's permission, be used by the cable operator to provide other cable services. Franchising authorities are directed by federal law to prescribe rules governing when such use is permitted.

For additional information:

Any questions or comments about PEG channels on a particular system should be directed to the cable operator or the local franchising authority, and not to the Federal Communications Commission. The name and telephone number of your franchising authority should appear on your cable bill, or should be available through your cable operator. With very limited exceptions, the Federal Communications Commission is not responsible for enforcing the federal statute governing PEG channels.

SECTION C

Westlaw

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116 S Ct. 2374 518 U.S. 727, 116 S.Ct. 2374, 135 L.Ed.2d 888, 64 USLW 4706, 96 Cal. Daily Op. Serv. 4792, 96 Daily Journal D.A.R. 7697, 3 Communications Reg. (P&F) 545 (Cite as: 518 U.S. 727, 116 S.Ct. 2374)

Supreme Court of the United States DENVER AREA EDUCATIONAL TELECOM-MUNICATIONS CONSORTIUM, INC., et al., Petitioners.

FEDERAL COMMUNICATIONS COMMISSION et al. No. 95-124.

> Argued Feb. 21, 1996. Decided June 28, 1996 FN*

FN* Together with No. 95-227, Alliance for Community Media v. Federal Communications Commission, also on certiorari to the same court

Television access programmers and cable television viewers petitioned for judicial review of Federal Communications Commission (FCC) orders implementing Cable Television Consumer Protection and Competition Act section governing indecent and obscene programming. Panel of the Court of Appeals, 10 F.3d 812, remanded, concluding that Act provisions violated First Amendment and that FCC's regulations posed serious constitutional questions. After full Court vacated panel's judgment, 15 F.3d 186, and on rehearing en banc, the Court of Appeals for the District of Columbia Circuit, 56 F.3d 105, held that provisions as implemented were consistent with First Amendment. Certiorari was granted. The Supreme Court, Justice Brever, held that: (1) provision permitting operator to prohibit patently offensive or indecent programming on leased access channels is consistent with First Amendment; (2) "segregate and block" provision with respect to leased access channels violates First Amendment; and (3) provision permitting operator to prohibit patently offensive or indecent programming on public access channels violates First Amendment.

Affirmed in part and reversed in part.

Justice Stevens and Justice Souter filed concurring opinions.

Justice O'Connor filed opinion concurring in part and dissenting in part.

Justice Kennedy, with whom Justice Ginsburg joined, filed opinion concurring in part, concurring in judgment in part, and dissenting in part.

Justice Thomas, with whom Chief Justice Rehnquist and Justice Scalia joined, filed opinion concurring in judgment in part and dissenting in part.

West Headnotes

[1] Constitutional Law 92 1494

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

> 92XVIII(A) In General 92XVIII(A)1 In General

92k1494 k. Applicability to Governmental or Private Action; State Action. Most Cited

(Formerly 92k90.1(1))

Constitutional Law 92 2127

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(W) Telecommunications and Com-

92k2126 Broadcasting and Electronic Media in General

92k2127 k. In General. Most Cited

Cases

puters

(Formerly 92k90.1(9))

First Amendment, the terms of which apply to governmental action, ordinarily does not itself throw into constitutional doubt decisions of private citizens to permit, or to restrict, speech even where those decisions take place within framework of regulatory regime such as broadcasting. (Per Justice Breyer with three Justices concurring, and the Chief Justice and two Justices concurring in the judgment in part.) U.S.C.A. Const.Amend. 1.

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518 U.S. 727, 116 S.Ct. 2374, 135 L.Ed.2d 888, 64 USLW 4706, 96 Cal. Daily Op. Serv. 4792, 96 Daily Journal D.A.R. 7697, 3 Communications Reg. (P&F) 545

(Cite as: 518 U.S. 727, 116 S.Ct. 2374)

[2] Constitutional Law 92 5 1490

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General 92XVIII(A)] In General

92k1490 k. In General. Most Cited

Cases

(Formerly 92k90(3))

Congress may not regulate speech except in cases of extraordinary need and with exercise of degree of care that Supreme Court has not elsewhere required. (Per Justice Breyer with three Justices concurring, and the Chief Justice and two Justices concurring in the judgment in part.) <u>U.S.C.A. Const.Amend. 1</u>.

[3] Constitutional Law 92 5 1491

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General 92XVIII(A)1 In General

92k1491 k. Purpose of Constitutional

Protection. Most Cited Cases
(Formerly 92k90(3))

First Amendment embodies overarching commitment to protect speech from

[4] Constitutional Law 92 505

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General 92XVIII(A)] In General

92k1505 k. Narrow Tailoring. Most

Cited Cases

(Formerly 92k90(3))

Government may directly regulate speech to address extraordinary problems where its regulations are appropriately tailored to resolve those problems without imposing unnecessarily great restriction on speech. (Per Justice Breyer with three Justices concurring, and the Chief Justice and two Justices concurring in the judgment in part.) U.S.C.A. Const.Amend. 1.

|5| Constitutional Law 92 2140

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(W) Telecommunications and Computers

92k2139 Cable and Satellite Television Systems; Community Antenna Systems

92k2140 k. In General. Most Cited

Cases

(Formerly 92k90.1(9))

Constitutional Law 92 2258

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and

92XVIII(Y) Sexual Expression 92k2252 Telecommunications

92k2258 k. Cable Television; Community Antenna and Satellite Systems. Most Cited Cases (Formerly 92k90.4(3))

Telecommunications 372 =1205

372 Telecommunications

372VI Cable Television

372k1202 Constitutional and Statutory Provisions

372k1205 k. Validity. Most Cited Cases (Formerly 372k384)

Telecommunications 372 € 1232

372 Telecommunications

372VI Cable Television

372k1229 Program Content; Access Rules
372k1232 k. Indecent, Obscene or Violent
Programs. Most Cited Cases

(Formerly 372k384)

Cable Television Consumer Protection and Competition Act provision which allows cable system operators to prohibit patently offensive or indecent programming transmitted over leased access channels is consistent with First Amendment; permissive and flexible nature of provision, coupled with viewpoint-neutral application, is constitutionally permissible way to protect children from exposure to patently offensive sex-related material, while accommodating both First Amendment interests served by access requirements and those served in restoring to opera-

Page 3 518 U.S. 727, 116 S.Ct. 2374, 135 L.Ed.2d 888, 64 USLW 4706, 96 Cal. Daily Op. Serv. 4792, 96 Daily Journal

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tors a degree of editorial control that Congress had previously removed. (Per Justice Breyer with three Justices concurring, and the Chief Justice and two Justices concurring in the judgment in part.) <u>U.S.C.A.</u> Const.Amend. 1; Communications Act of 1934, § 612(h), as amended, 47 U.S.C.A. § 532(h).

[6] Constitutional Law 92 2245

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(Y) Sexual Expression

92k2244 Children and Minors, Protection

of

92k2245 k. In General. Most Cited

Cases

(Formerly 92k90.4(1))

Interest of protecting children from exposure to patently offensive sex-related material is compelling. (Per Justice Breyer with three Justices concurring, and the Chief Justice and two Justices concurring in the judgment in part.) <u>U.S.C.A. Const. Amend. 1</u>.

17] Constitutional Law 92 2140

92 Constitutional Law

 $\underline{92XVIII}$ Freedom of Speech, Expression, and Press

92XVIII(W) Telecommunications and Computers

92k2139 Cable and Satellite Television Systems; Community Antenna Systems

92k2140 k. In General. Most Cited

Cases

(Formerly 92k90.1(9))

Telecommunications 372 1230

372 Telecommunications

372V1 Cable Television

372k1229 Program Content; Access Rules 372k1230 k. In General. Most Cited Cases (Formerly 372k457(1), 372k449.5(1))

In context of cable broadcast that involves access requirement, expressive interests of cable operators play legitimate role in First Amendment analysis. (Per Justice Breyer with three Justices concurring, and the Chief Justice and two Justices concurring in the judgment in part.) U.S.C.A. Const. Amend. 1.

[8] Constitutional Law 92 1741

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(G) Property and Events

92XVIII(G)2 Government Property and

Events

92k1740 Limited Public Forum in Gen-

eral

92k1741 k. In General. Most Cited

Cases

(Formerly 92k90.1(4))

Public forum may be created for limited purpose. (Per Justice Breyer with three Justices concurring, and the Chief Justice and two Justices concurring in the judgment in part.) U.S.C.A. Const. Amend. 1.

[9] Constitutional Law 92 2140

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and

92XVIII(W) Telecommunications and Computers

92k2139 Cable and Satellite Television Systems; Community Antenna Systems

92k2140 k. In General. Most Cited

Cases

(Formerly 92k90.1(9))

Constitutional Law 92 2258

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and

Press

92XVIII(Y) Sexual Expression 92k2252 Telecommunications

92k2258 k. Cable Television; Commu-

nity Antenna and Satellite Systems. Most Cited Cases (Formerly 92k90.4(3))

Telecommunications 372 € 1205

372 Telecommunications

372VI Cable Television

372k1202 Constitutional and Statutory Provisions

372k1205 k. Validity. Most Cited Cases

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(Cite as: 518 U.S. 727, 116 S.Ct. 2374)

(Formerly 372k384)

Telecommunications 372 = 1232

372 Telecommunications 372VI Cable Television

372k1229 Program Content; Access Rules 372k1232 k. Indecent, Obscene or Violent

Programs. Most Cited Cases

(Formerly 372k384) Effects of Congress' decision to allow cable system operators to prohibit patently offensive or indecent programming transmitted over leased access channels are same on interests of programmers, viewers, cable operators, and children, whether Supreme Court characterizes Congress' decision as one that limits access to public forum, discriminates in common carriage, or constrains speech because of its content; if Court considers particular limitation of indecent television programming acceptable as constraint on speech, Court must no less accept limitation it places on access to claimed public forum or on use of common carrier. (Per Justice Breyer with three Justices concurring, and the Chief Justice and two Justices concurring in the judgment in part.) U.S.C.A. Const. Amend. 1; Communications Act of 1934, § 612(h), as amended, 47 U.S.C.A. § 532(h).

[10] Constitutional Law 92 2140

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(W) Telecommunications and Computers

92k2139 Cable and Satellite Television Systems; Community Antenna Systems

92k2140 k. In General. Most Cited

Cases

(Formerly 92k90.1(9))

Constitutional Law 92 2258

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(Y) Sexual Expression 92k2252 Telecommunications

92k2258 k. Cable Television; Community Antenna and Satellite Systems. Most Cited Cases (Formerly 92k90.4(3))

Telecommunications 372 1205

372 Telecommunications

372VI Cable Television

372k1202 Constitutional and Statutory Provi-

sions

372k1205 k. Validity. Most Cited Cases (Formerly 372k457(1), 372k449.5(1))

Telecommunications 372 € 1232

372 Telecommunications

372VI Cable Television

372k1229 Program Content; Access Rules 372k1232 k. Indecent, Obscene or Violent

Programs. Most Cited Cases

(Formerly 372k457(1), 372k449.5(1))

If Cable Television Consumer Protection and Competition Act provisions allowing cable system operators to prohibit patently offensive or indecent programming transmitted over leased access channels are viewed through a public forum lens, provisions should be viewed as limiting otherwise totally open nature of forum that leased access channels provide for communication of other than patently offensive sexual material, taking account of fact that limitation was imposed in light of experience gained from maintaining totally open forum. (Per Justice Breyer with three Justices concurring, and the Chief Justice and two Justices concurring in the judgment in part.) U.S.C.A. Const. Amend. 1; Communications Act of 1934, § 612(h), as amended, 47 U.S.C.A. § 532(h).

[11] Constitutional Law 92 2140

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(W) Telecommunications and Com-

puters

92k2139 Cable and Satellite Television Systems; Community Antenna Systems

92k2140 k. In General. Most Cited

(Formerly 92k90.1(9))

Constitutional Law 92 2258

(Cite as: 518 U.S. 727, 116 S.Ct. 2374)

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(Y) Sexual Expression
92k2252 Telecommunications
92k2258 k. Cable Television; Community Antenna and Satellite Systems. Most Cited Cases
(Formerly 92k90.4(1))

Telecommunications 372 205

372 Telecommunications

372VI Cable Television

372k1202 Constitutional and Statutory Provi-

sions

372k1205 k. Validity. Most Cited Cases (Formerly 372k384)

Telecommunications 372 232

372 Telecommunications

372VI Cable Television

372k1229 Program Content; Access Rules
372k1232 k. Indecent, Obscene or Violent

Programs Most Cited Cases

(Formerly 372k384)

Limitation on availability of access cable channels imposed by Cable Television Consumer Protection and Competition Act provisions allowing cable system operators to prohibit patently offensive or indecent programming transmitted over leased access channels is justified by government's interest in protecting children, permissive aspect of statute, and nature of medium. (Per Justice Breyer with three Justices concurring, and the Chief Justice and two Justices concurring in the judgment in part.) U.S.C.A. Const.Amend. 1; Communications Act of 1934, § 612(h), as amended, 47 U.S.C.A. § 532(h).

[12] Constitutional Law 92 2137

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(W) Telecommunications and Com-

puters

92k2135 Television

92k2137 k. Program Content, Most

Cited Cases

(Formerly 92k90.1(9))

Telecommunications 372 = 1151(2)

372 Telecommunications

372V Television and Radio Broadcasting 372k1147 Programs

372k1151 Improper Subject Matter and Censorship

372k1151(2) k. Indecent, Obscene or

Violent Material. Most Cited Cases

(Formerly 372k432)

Whether televised program is "patently offensive" depends on context, degree, and time of broadcast. (Per Justice Breyer with three Justices concurring, and the Chief Justice and two Justices concurring in the judgment in part.) U.S.C.A. Const.Amend. 1.

[13] Constitutional Law 92 2258

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(Y) Sexual Expression

92k2252 Telecommunications

92k2258 k. Cable Television; Community Antenna and Satellite Systems. Most Cited Cases (Formerly 92k90.4(3))

Telecommunications 372 € 1205

372 Telecommunications

372VI Cable Television

372k1202 Constitutional and Statutory Provi-

sion

372k1205 k. Validity. Most Cited Cases (Formerly 372k384)

Telecommunications 372 € 1232

372 Telecommunications

372VI Cable Television

372k1229 Program Content; Access Rules 372k1232 k. Indecent, Obscene or Violent

Programs. Most Cited Cases

(Formerly 372k384)

Cable Television Consumer Protection and Competition Act provision allowing cable system operators to prohibit "programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive man-

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ner as measured by contemporary community standards" is not impermissibly vague; statute permits operators to screen programs only pursuant to written and published policy, "reasonable belief" qualifier is designed to provide legal excuse for at least one honest mistake from liability that might otherwise attach, and contours of reasonableness shield constrain discretion of operator as much as they protect it. (Per Justice Brever with three Justices concurring, and the Chief Justice and two Justices concurring in the judgment in part.) U.S.C.A. Const.Amend. 1; Communications Act of 1934, § 612(h), as amended, 47 U.S.C.A. § 532(h).

[14] Constitutional Law 92 2140

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(W) Telecommunications and Computers

92k2139 Cable and Satellite Television Systems; Community Antenna Systems

92k2140 k. In General. Most Cited

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Telecommunications 372 1205

372 Telecommunications

372VI Cable Television

372k1202 Constitutional and Statutory Provisions

372k1205 k. Validity. Most Cited Cases (Formerly 372k384)

Telecommunications 372 1232

372 Telecommunications

372VI Cable Television

372k1229 Program Content; Access Rules 372k1232 k. Indecent, Obscene or Violent

Programs. Most Cited Cases

(Formerly 372k384)

Cable Television Consumer Protection and Competition Act provision which requires, with respect to leased access channels, that cable system operators place patently offensive programming on separate channel, block channel from viewer access, and unblock channel within 30 days of subscriber's written

request violates First Amendment; "segregate and block" requirements have obvious speech-restrictive effect on viewers and are not a narrowly, or reasonably, tailored effort to protect children from exposure to patently offensive materials, as Congress has utilized less restrictive means to protect children from patently offensive sexual material on unleased cable channels. U.S.C.A. Const.Amend. 1; Communications Act of 1934, § 612(j), as amended, 47 U.S.C.A. § 532(j); 47 C.F.R. § 76.701(b-d, g).

[15] United States 393 22

393 United States

393I Government in General

393k22 k. Legislative Power and Exercise Thereof in General Most Cited Cases

(Formerly 92k1066, 92k81)

When enacting legislation, Congress need not deal with every problem at once and must have degree of leeway in tailoring means to ends.

[16] Constitutional Law 92 1490

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

> 92XVIII(A) In General 92XVIII(A)1 In General

92k1490 k. In General. Most Cited

Cases

(Formerly 92k90(1))

Where record before Congress or before administrative agency provides no convincing explanation, Supreme Court will not stretch limits of plausible, to create hypothetical nonobvious explanations in order to justify laws that impose significant restrictions upon speech. U.S.C.A. Const.Amend. 1.

[17] Constitutional Law 92 2140

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(W) Telecommunications and Computers

92k2139 Cable and Satellite Television Systems; Community Antenna Systems

92k2140 k. In General. Most Cited

Cases

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92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(Y) Sexual Expression
92k2252 Telecommunications
92k2258 k. Cable Television; Community Antenna and Satellite Systems. Most Cited Cases

Telecommunications 372 1205

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372 Telecommunications
 372VI Cable Television
 372k1202 Constitutional and Statutory Provisions

372k1205 k. Validity, Most Cited Cases (Formerly 372k384)

Telecommunications 372 € 1232

372 Telecommunications 372VI Cable Television

372k1229 Program Content; Access Rules
372k1232 k. Indecent, Obscene or Violent

Programs. Most Cited Cases (Formerly 372k384)

Cable Television Consumer Protection and Competition Act provision which allows cable system operators to prohibit patently offensive or indecent programming transmitted over public access channels violates First Amendment; provision does not restore to operators editorial rights they once had, locally accountable bodies are capable of addressing programming problems, existence of system aimed at encouraging and securing programming that community considers valuable strongly suggests that "cable operator's veto" is less likely necessary to achieve statute's basic objective, and public/nonprofit programming control systems in place would normally avoid any child-related programming problems. (Per Justice Breyer with two Justices concurring and two Justices concurring in the judgment in part.) U.S.C.A. Const. Amend. 1: Cable Television Consumer Protection and Competition Act of 1992, § 10(c), 47 U.S.C.A. § 531 note; 47 C.F.R. § 76.702 (1995).

1181 Statutes 361 64(1)

361 Statutes

361I Enactment, Requisites, and Validity in General

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361k64 Effect of Partial Invalidity

361k64(1) k. In General. Most Cited Cases If Congress would have passed statutory provision had it known that remaining provisions in enactment were unconstitutional, then all provisions need not be invalidated.

1191 Statutes 361 64(2)

361 Statutes

3611 Enactment, Requisites, and Validity in General

361k64(2) k Acts Relating to Par

361k64(2) k. Acts Relating to Particular Subjects in General. Most Cited Cases

Cable Television Consumer Protection and Competition Act provision which allows cable system operators to prohibit patently offensive or indecent programming on leased access channels is severable from unconstitutional provisions regarding "segregate and block" requirements for leased access channels and "operator veto" for public access channels even though Act contains no express severability clause; presence of public access channel provision has little, if any, effect on leased access channels, law treats programming decisions on leased channels just as it treats all other channels in absence of "segregate and block" provisions, and, in light of Congress's basic objective of protecting children, Congress would have preferred one provision standing by itself to none. (Per Justice Breyer with three Justices concurring, and the Chief Justice and two Justices concurring in the judgment in part.) U.S.C.A. Const. Amend. 1; Communications Act of 1934, § 612(h, j), as amended, 47 U.S.C.A. § 532(h, j); Cable Television Consumer Protection and Competition Act of 1992, § 10(c), 47 U.S.C.A. § 531 note; 47 C.F.R. § 76.701(b-d, g); § 76.702 (1995).

**2377 *727 Syllabus FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See <u>United States v. Detroit Lumber Co.</u> 200 U.S. 321, 337, 26

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S.Ct. 282, 286, 50 L.Ed. 499.

These cases involve three sections of the Cable Television Consumer Protection and Competition Act of 1992 (Act), as implemented by Federal Communications Commission (FCC) regulations. Both § 10(a) of the Act-which applies to "leased access channels" reserved under federal law for commercial lease by parties unaffiliated with the cable television system operator-and § 10(c)-which regulates "public access channels" required by local governments for public, educational, and governmental programmingessentially permit the operator to allow or prohibit "programming" that it "reasonably believes ... depicts sexual ... activities or organs in a patently offensive manner." Under § 10(b), which applies only to leased access channels, operators are required to segregate "patently offensive" programming on a single channel, to block that channel from viewer access, and to unblock it (or later to reblock it) within 30 days of a subscriber's written request. Between 1984, when Congress authorized municipalities to require operators to create public access channels, and the Act's passage, federal law prohibited operators from exercising any editorial control over the content of programs broadcast over either type of access channel. Petitioners sought judicial review of §§ 10(a), (b), and (c), and the en banc Court of Appeals held that all three sections (as implemented) were consis tent with the First Amendment.

Held: The judgment is affirmed in part and reversed in part.

56 F.3d 105, affirmed in part and reversed in part.

Justice <u>BREYER</u> delivered the opinion of the Court with respect to Part III, concluding**2378 that § 10(b) violates the First Amendment. That section's "segregate and block" requirements have obvious speech-restrictive effects for viewers, who cannot watch programs segregated on the "patently offensive" channel without considerable advance planning or receive just an occasional few such programs, and who may *728 judge a program's value through the company it keeps or refrain from subscribing to the segregated channel out of fear that the operator will disclose its subscriber list. Moreover, § 10(b) is not appropriately tailored to achieve its basic, legitimate objective of protecting children from exposure to "patently offensive" materials. Less restrictive means

utilized by Congress elsewhere to protect children from "patently offensive" sexual material broadcast on cable channels indicate that § 10(b) is overly restrictive while its benefits are speculative. These include some provisions of the Telecommunications Act of 1996, which utilizes blocking without written request, "V-chips," and other significantly less restrictive means, and the "lockbox" requirement that has been in place since the Cable Act of 1984. Pp. 2390-2394.

Justice <u>BREYER</u>, joined by Justice <u>STEVENS</u>, Justice <u>O'CONNOR</u>, and Justice <u>SOUTER</u>, concluded in Parts I and II that § 10(a) is consistent with the First Amendment. Pp. 2382-2390.

(a) Close scrutiny demonstrates that § 10(a) properly addresses a serious problem without imposing, in light of the relevant competing interests, an unnecessarily great restriction on speech. First, the section comes accompanied with the extremely important child-protection justification that this Court has often found compelling. See, e.g., Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93, Second, § 10(a) arises in a very particular context-congressional permission for cable operators to regulate programming that, but for a previous Act of Congress, would have had no path of access to cable channels free of an operator's control. The First Amendment interests involved are therefore complex, and require a balance between those interests served by the access requirements themselves (increasing the availability of avenues of expression to programmers who otherwise would not have them), see H.R.Rep. No. 98-934, pp. 31-36, and the disadvantage to the First Amendment interests of cable operators and other programmers (those to whom the operator would have assigned the channels devoted to access). See Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 635-637, 114 S.Ct. 2445, 2455-2456. 129 L.Ed.2d 497. Third, the problem § 10(a) addresses is analogous to the "indecent" radio broadcasts at issue in FCC v. Pacifica Foundation. 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073, and the balance Congress struck here is commensurate with the balance the Court approved in that case. Fourth, § 10(a)'s permissive nature means that it likely restricts speech less than, not more than, the ban at issue in Pacifica. The importance of the interest at stake here-protecting children from exposure to patently offensive depictions of sex; the accommoda-

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tion of the interests of programmers in maintaining access channels and of cable operators in editing the contents of their channels; the similarity of the problem and its solution to those at issue in <u>Pacificar</u> and the flexibility inherent in an approach *729 that permits private cable operators to make editorial decisions, persuasively establishes that § 10(a) is a sufficiently tailored response to an extraordinarily important problem involving a complex balance of interests. <u>Sable, supra</u>, at 128, 109 S.Ct., at 2837-2838, and <u>Turner, supra</u>, at 637-641, 114 S.Ct., at 2456-2458, distinguished. Pp. 2382-2388.

- (b) Petitioners' reliance on this Court's "public forum" cases is unavailing. It is unnecessary and unwise to decide whether or how to apply the public forum doctrine to leased access channels. First, it is not clear whether that doctrine should be imported wholesale into common carriage regulation of such a new and changing area. Second, although limited public forums are permissible, the Court has not yet determined whether the decision to limit a forum is necessarily subject to the highest level of scrutiny, and these cases do not require that it do so now. Finally, and most important, the features that make § 10(a) an acceptable constraint **2379 on speech also make it an acceptable limitation on access to the claimed public forum. Pp. 2388-2389.
- (c) Section 10(a)'s definition of the materials it regulates is not impermissibly vague. Because the language used is similar to that adopted in Miller v. California, 413 U.S. 15, 24, 93 S.Ct, 2607, 2615, 37 L.Ed.2d 419, as a "guidelin[e]" for state obscenity laws, it would appear to narrow cable operators' program-screening authority to materials that involve the same kind of sexually explicit materials that would be obscene under Miller, but that might have "serious literary, artistic, political or scientific value" or nonprurient purposes, ibid. That the definition is not overly broad is further indicated by this Court's construction of the phrase "patently offensive," see Pacifica, supra, at 748, 750, 98 S.Ct., at 3039-3040. 3041, which would narrow the category late at night when the audience is basically adult, and by the fact that § 10(a) permits operators to screen programs only pursuant to a "written and published policy." The definition's "reasonabl[e] belie[f]" qualifier seems designed to provide a legal excuse for the operator's honest mistake, and it constrains the operator's discretion as much as it protects it. Pp. 2389-

2390.

Justice BREYER, joined by Justice STEVENS and Justice SOUTER, concluded in Part IV that § 10(c) violates the First Amendment. Section 10(c), although like § 10(a) a permissive provision, is different from § 10(a) for four reasons. First, cable operators have not historically exercised editorial control over public access channels, such that § 10(c)'s restriction on programmers' capacity to speak does not effect a countervailing removal of a restriction on cable operators' speech. Second, programming on those channels is normally subject to complex supervisory systems composed of both public and private elements, and § 10(c) is therefore likely less necessary to protect children. Third, the existence of a system that encourages and secures programming that the *730 community considers valuable strongly suggests that a "cable operator's veto" is more likely to erroneously exclude borderline programs that should be broadcast, than to achieve the statute's basic objective of protecting children. Fourth, the Government has not shown that there is a significant enough problem of patently offensive broadcasts to children, over public access channels, that justifies the restriction imposed by § 10(c). Consequently, § 10(c) violates the First Amendment. Pp. 2394-2397.

Justice KENNEDY, joined by Justice GINSBURG, concurred in the judgment that § 10(c) is invalid, but for different reasons. Because the public access channels regulated by § 10(c) are required by local cable franchise authorities, those channels are "designated public forums," i.e., property that the government has opened for expressive activity by the public. International Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678, 112 S.Ct. 2701, 2705, 120 L.Ed.2d 541. Section 10(c) vests the cable operator with a power under federal law, defined by reference to the content of speech, to override the franchise agreement and undercut the public forum the agreement creates. Where the government thus excludes speech from a public forum on the basis of its content, the Constitution requires that the regulation be given the most exacting scrutiny. See, e.g., ibid. Section 10(c) cannot survive strict scrutiny. Although Congress has a compelling interest in protecting children from indecent speech, see, e.g., Sable Communications of Colo., Inc. v. FCC, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836-2837, 106 L.Ed.2d 93, § 10(c) is not narrowly tailored to serve that interest, since,

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among other things, there is no basis in the record establishing that § 10(c) is the least restrictive means to accomplish that purpose. See, e.g., id., at 128-130, 109 S.Ct., at 2837-2839. The Government's argument for not applying strict scrutiny here, that indecent cablecasts are subject to the lower standard of review applied in FCC v. Pacifica Foundation, 438 U.S. 726, 748, 98 S.Ct. 3026, 3039-3040, 57 L.Ed.2d 1073, is not persuasive, since that lower standard does not even apply to infringements on the liberties of cable operators, Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 637-641, 114 S.Ct. 2445, 2456-2458. There is less cause for a lower *=2380 standard when the rights of cable programmers and viewers are at stake. Pp. 2404-2405, 2409-2410, 2415-2419.

Justice THOMAS, joined by THE CHIEF JUSTICE and Justice SCALIA, agreed that § 10(a) is constitutionally permissible. Cable operators are generally entitled to much the same First Amendment protection as the print media, Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 637, 639, 114 S.Ct. 2445. 2456, 2457. Because Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 94 S.Ct, 2831, 41 L.Ed.2d 730, and Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1, 106 S.Ct. 903, 89 L.Ed.2d 1. are therefore applicable, see Turner, supra, at 681-682, 114 S.Ct., at 2478-2479 (O'CON-NOR, J., concurring in part and dissenting in part), the cable operator's editorial rights have general primacy under the First Amendment over *731 the rights of programmers to transmit and of viewers to watch. None of the petitioners are cable operators; they are all cable viewers or access programmers or their representative organizations. Because the cable access provisions are part of a scheme that restricts operators' free speech rights and expands the speaking opportunities of programmers who have no underlying constitutional right to speak through the cable medium, the programmers cannot challenge the scheme, or a particular part of it, as an abridgment of their "freedom of speech." Sections 10(a) and (c) merely restore part of the editorial discretion an operator would have absent Government regulation. Pp. 2419-2426.

BREYER, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Part III, in which <u>STEVENS</u>, <u>O'CONNOR</u>, <u>KENNEDY</u>, <u>SOUTER</u>, and <u>GINSBURG</u>, JJ., joined,

an opinion with respect to Parts I, II, and V, in which STEVENS, O'CONNOR and SOUTER, JJ., joined, and an opinion with respect to Parts IV and VI, in which STEVENS and SOUTER, JJ., joined. STEVENS, J., post, p. 2398, and SOUTER, J., post, p. 2401, filed concurring opinions. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, post, p. 2403. KENNEDY, J., filed an opinion concurring in part, in which GINSBURG, J., joined, post, p. 2404. THOMAS, J., filed an opinion concurring in the judgment in part, in which REHNOUIST, C.J., and SCALIA, J., joined, post, p. 2419.

I. Michael Greenberger, Washington, DC, for petitioners.

Lawrence G. Wallace, Washington, DC, for respondents.

Brian D. Graifman, New York City, Robert T. Perry, Brooklyn, NY, for New York City petitioners.

For U.S. Supreme Court briefs, see:1996 WL 781698 (Pet.Brief)1996 WL 763721 (Pet.Brief)1996 WL 763716 (Pet.Brief)1996 WL 32782 (Resp.Brief)1996 WL 67637 (Reply.Brief)1996 WL 63305 (Reply.Brief)1996 WL 63304 (Reply.Brief)

*732 Justice <u>BREYER</u> announced the judgment of the Court and delivered the opinion of the Court with respect to Part III, an opinion with respect to Parts I, II, and V, in which Justice <u>STEVENS</u>, Justice <u>O'CONNOR</u>, and Justice <u>SOUTER</u> join, and an opinion with respect to Parts IV and VI, in which Justice <u>STEVENS</u> and Justice <u>SOUTER</u> join.

These cases present First Amendment challenges to three statutory provisions that seek to regulate the broadcasting of "patently offensive" sex-related material on cable television. Cable Television Consumer Protection and Competition Act of 1992 (1992 Act or Act), 106 Stat. 1486, §§ 10(a), 10(b), and 10(c), 47 U.S.C. §§ 532(h), 532(j), and note following § 531. The provisions apply to programs broadcast over cable on what are known as "leased access channels" and "public, educational, or governmental channels." Two of the provisions essentially permit a cable system operator to prohibit the broadcasting of "programming" that the "operator reasonably believes describes or depicts sexual or excretory activities or

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organs in a patently offensive manner." 1992 *733 Act, § 10(a); see § 10(c). See also **2381 In re Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992: Indecent Programming and Other Types of Materials on Cable Access Channels, First Report and Order, 8 FCC Rcd 998 (1993) (First Report and Order); In re Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, Indecent Programming and Other Types of Materials on Cable Access Channels, Second Report and Order, 8 FCC Rcd 2638 (1993) (Second Report and Order). The remaining provision requires cable system operators to segregate certain "patently offensive" programming, to place it on a single channel, and to block that channel from viewer access unless the viewer requests access in advance and in writing. 1992 Act, § 10(b); 47 CFR § 76.701(g) (1995).

We conclude that the first provision-which permits the operator to decide whether or not to broadcast such programs on leased access channels-is consistent with the First Amendment. The second provision, which requires leased channel operators to segregate and to block that programming, and the third provision, applicable to public, educational, and governmental channels, violate the First Amendment, for they are not appropriately tailored to achieve the basic, legitimate objective of protecting children from exposure to "patently offensive" material.

I

Cable operators typically own a physical cable network used to convey programming over several dozen cable channels into subscribers' houses. Program sources vary from channel to channel. Most channels carry programming produced by independent firms, including "many national and regional cable programming networks that have emerged in recent years," Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 629, 114 S.Ct. 2445, 2452, 129 L.Ed.2d 497 (1994), as well as some programming that the system operator itself (or an operator affiliate)*734 may provide. Other channels may simply retransmit through cable the signals of over-the-air broadcast stations. Ibid. Certain special channels here at issue, called "leased channels" and "public, educational, or governmental channels," carry programs provided by those to whom the law gives special cable system access rights.

A "leased channel" is a channel that federal law requires a cable system operator to reserve for commercial lease by unaffiliated third parties. About 10 to 15 percent of a cable system's channels would typically fall into this category. See 47 U.S.C. § 532(b). "[P]ublic, educational, or governmental channels" (which we shall call "public access" channels) are channels that, over the years, local governments have required cable system operators to set aside for public, educational, or governmental purposes as part of the consideration an operator gives in return for permission to install cables under city streets and to use public rights-of-way. See § 531; see also H.R.Rep. No. 98-934, p. 30 (1984), U.S.Code Cong. & Admin. News 1984, pp. 4655, 4667 (authorizing local authorities to require creation of public access channels). Between 1984 and 1992, federal law (as had much pre-1984 state law, in respect to public access channels) prohibited cable system operators from exercising any editorial control over the content of any program broadcast over either leased or public access channels. See 47 U.S.C. §§ 531(e) (public access), 532(c)(2) (leased access).

In 1992, in an effort to control sexually explicit programming conveyed over access channels, Congress enacted the three provisions before us. The first two provisions relate to leased channels. The first says:

"This subsection shall permit a cable operator to enforce prospectively a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 1992 Act, § 10(a)(2), 106 Stat. 1486.

*735 The second provision, applicable only to leased channels, requires cable operators to segregate and to block similar programming if they decide to permit, rather than to prohibit, its broadcast. The provision tells the Federal Communications Commission (FCC or Commission) to promulgate regulations that will (a) require "programmers to inform cable operators if the program[ming] would be indecent as defined by Commission regulations"**2382; (b) require "cable operators to place" such material "on a single channel"; and (c) require "cable operators to block such single channel unless the subscriber requests access

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to such channel in writing." 1992 Act, § 10(b)(1). The Commission issued regulations defining the material at issue in terms virtually identical to those we have already set forth, namely, as descriptions or depictions of "sexual or excretory activities or organs in a patently offensive manner" as measured by the cable viewing community. First Report and Order ¶ 33-38, at 1003-1004. The regulations require the cable operators to place this material on a single channel and to block it (say, by scrambling). They also require the system operator to provide access to the blocked channel "within 30 days" of a subscriber's written request for access and to reblock it within 30 days of a subscriber's request to do so. 47 CFR § 76.701(c) (1995).

The third provision is similar to the first provision, but applies only to public access channels. The relevant statutory section instructs the FCC to promulgate regulations that will

"enable a cable operator of a cable system to prohibit the use, on such system, of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." 1992 Act, § 10(c), 106 Stat. 1486.

*736 The FCC, carrying out this statutory instruction, promulgated regulations defining "sexually explicit" in language almost identical to that in the statute's leased channel provision, namely, as descriptions or depictions of "sexual or excretory activities or organs in a patently offensive manner" as measured by the cable viewing community. See § 76.702 (1995) (incorporating definition from 47 CFR § 76.701(g)).

The upshot is, as we said at the beginning, that the federal law before us (the statute as implemented through regulations) now permits cable operators either to allow or to forbid the transmission of "patently offensive" sex-related materials over both leased and public access channels, and requires those operators, at a minimum, to segregate and to block transmission of that same material on leased channels

Petitioners, claiming that the three statutory provisions, as implemented by the Commission regula-

tions, violate the First Amendment, sought judicial review of the Commission's First Report and Order and its Second Report and Order in the United States Court of Appeals for the District of Columbia Circuit. A panel of that Circuit agreed with petitioners that the provisions violated the First Amendment. Alliance for Community Media v. FCC, 10 F.3d 812 (1993). The entire Court of Appeals, however, heard the case en banc and reached the opposite conclusion. It held that all three statutory provisions (as implemented) were consistent with the First Amendment. Alliance for Community Media v. FCC, 56 F.3d 105 (1995). Four of the eleven en banc appeals court judges dissented. Two of the dissenting judges concluded that all three provisions violated the First Amendment. Two others thought that either one, or two, but not all three of the provisions, violated the First Amendment. We granted certiorari to review the en banc court's First Amendment determinations.

*737 II

We turn initially to the provision that permits cable system operators to prohibit "patently offensive" (or "indecent") programming transmitted over leased access channels. 1992 Act, § 10(a). The Court of Appeals held that this provision did not violate the First Amendment because the First Amendment prohibits only "Congress" (and, through the Fourteenth Amendment, a "State"), not private individuals, from "abridging the freedom of speech." Although the court said that it found no "state action," 56 F.3d. at 113, it could not have meant that phrase literally, for, of course, petitioners attack (as "abridg[ing] ... speech") a congressional statute-which, by definition, is an Act of "Congress." More likely, the court viewed this statute's "permissive" provisions as not themselves restricting speech, but, rather, as simply reaffirming**2383 the authority to pick and choose programming that a private entity, say, a private broadcaster, would have had in the absence of intervention by any federal, or local, governmental entity.

[1] We recognize that the First Amendment, the terms of which apply to governmental action, ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech-and this is so *ordinarily* even where those decisions take place within the framework of a regulatory regime such as broadcasting. Were that not so, courts might have to face the difficult, and

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potentially restrictive, practical task of deciding which, among any number of private parties involved in providing a program (for example, networks, station owners, program editors, and program producers), is the "speaker" whose rights may not be abridged, and who is the speech-restricting "censor." Furthermore, as this Court has held, the editorial function itself is an aspect of "speech," see Turner. 512 U.S., at 636, 114 S.Ct., at 2456, and a court's decision that a private party, say, the station owner, is a "censor," could itself interfere*738 with that private "censor's" freedom to speak as an editor. Thus, not surprisingly, this Court's First Amendment broadcasting cases have dealt with governmental efforts to restrict, not governmental efforts to provide or to maintain, a broadcaster's freedom to pick and to choose programming. Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973) (striking restrictions on broadcaster's ability to refuse to carry political advertising); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969) (upholding restrictions on editorial authority); FCC v. League of Women Voters of Cal. 468 U.S. 364, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984) (striking restrictions); cf. Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y., 447 U.S. 530. 100 S.Ct. 2326. 65 L.Ed.2d 319 (1980) (striking ban on political speech by public utility using its billing envelopes as a broadcast medium); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y., 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) (striking restriction on public utility advertising).

Nonetheless, petitioners, while conceding that this is ordinarily so, point to circumstances that, in their view, make the analogy with private broadcasters inapposite and make these cases special ones, warranting a different constitutional result. As a practical matter, they say, cable system operators have considerably more power to "censor" program viewing than do broadcasters, for individual communities typically have only one cable system, linking broadcasters and other program providers with each community's many subscribers. See Turner, supra, at 633, 114 S.Ct., at 2454 (only one cable system in most communities; nationally more than 60% of homes subscribe to cable, which then becomes the primary or sole source of video programming in the overwhelming majority of these homes). Moreover, concern about system operators' exercise of this considerable power originally led government-local and federal-to insist that operators provide leased and public access channels free of operator editorial control. H.R.Rep. No. 98-934, at 30-31. To permit system operators to supervise programming on leased access channels will *739 create the very private-censorship risk that this anticensorship effort sought to avoid. At the same time, petitioners add, cable systems have two relevant special characteristics. They are unusually involved with government, for they depend upon government permission and government facilities (streets, rights-of-way) to string the cable necessary for their services. And in respect to leased channels, their speech interests are relatively weak because they act less like editors, such as newspapers or television broadcasters, than like common carriers, such as telephone companies.

Under these circumstances, petitioners conclude, Congress' "permissive" law, in actuality, will "abridge" their free speech. And this Court should treat that law as a congressionally imposed, contentbased, restriction unredeemed as a properly tailored effort to serve a "compelling interest." See **2384Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118, 112 S.Ct. 501, 509, 116 L.Ed.2d 476 (1991); Sable Communications of Cal., Inc. v. FCC. 492 U.S. 115, 126, 109 S.Ct. 2829, 2836-2837, 106 L.Ed.2d 93 (1989). They further analogize the provisions to constitutionally forbidden content-based restrictions upon speech taking place in "public forums" such as public streets, parks, or buildings dedicated to open speech and communication. See Cornelius v. NAACP Legal Defense & Ed. Fund. Inc., 473 U.S. 788, 802, 105 S.Ct. 3439, 3449, 87 L.Ed.2d 567 (1985); Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45, 103 S.Ct. 948, 954-955, 74 L.Ed.2d 794 (1983); see also H.R.Rep. No. 98-934, supra, at 30 (identifying public access channels as the electronic equivalent of a "speaker's soap box"). And, finally, petitioners say that the legal standard the law contains (the "patently offensive" standard) is unconstitutionally vague. See, e.g., Interstate Circuit, Inc. v. Dallas, 390 U.S. 676. 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968) (rejecting censorship ordinance as vague, even though it was intended to protect children).

Like petitioners, Justices KENNEDY and THOMAS would have us decide these cases simply by transferring and applying literally categorical standards this Court has developed in other contexts. For Justice

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KENNEDY, leased access *740 channels are like a common carrier, cablecast is a protected medium, strict scrutiny applies, § 10(a) fails this test, and, therefore, § 10(a) is invalid. Post, at 2411-2413, 2416-2417. For Justice THOMAS, the case is simple because the cable operator who owns the system over which access channels are broadcast, like a bookstore owner with respect to what it displays on the shelves, has a predominant First Amendment interest. Post, at 2421-2422, 2424-2425. Both categorical approaches suffer from the same flaws: They import law developed in very different contexts into a new and changing environment, and they lack the flexibility necessary to allow government to respond to very serious practical problems without sacrificing the free exchange of ideas the First Amendment is designed to protect.

[2] The history of this Court's First Amendment jurisprudence, however, is one of continual development, as the Constitution's general command that "Congress shall make no law ... abridging the freedom of speech, or of the press," has been applied to new circumstances requiring different adaptations of prior principles and precedents. The essence of that protection is that Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required. See, e.g., Schenck v. United States. 249 U.S. 47, 51-52, 39 S.Ct. 247, 248-249, 63 L.Ed. 470 (1919); Abrams v. United States, 250 U.S. 616, 627-628, 40 S.Ct. 17, 21, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting); West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 639, 63 S.Ct, 1178, 1186, 87 L.Ed. 1628 (1943); Texas v. Johnson, 491 U.S. 397. 418-420, 109 S.Ct. 2533, 2547-2548, 105 L.Ed.2d 342 (1989). At the same time, our cases have not left Congress or the States powerless to address the most serious problems. See, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942); Young v. American Mini Theatres. Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); FCC v. Pacifica Foundation, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978).

Over the years, this Court has restated and refined these basic First Amendment principles, adopting them more particularly to the balance of competing interests and the special *741 circumstances of each field of application. See, e.g., New York Times Co. v. Sullivan. 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed,2d 686

(1964) (allowing criticism of public officials to be regulated by civil libel only if the plaintiff shows actual malice): Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) (allowing greater regulation of speech harming individuals who are not public officials, but still requiring a negligence standard); Red Lion Broadcasting Co. v. FCC. 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969) (employing highly flexible standard in response to the scarcity problem unique to over-the-air broadcast); Arkansas Writers' Project. Inc. v. Ragland, 481 U.S. 221, 231-232, 107 S.Ct. 1722, 1728-1729, 95 L.Ed.2d 209 (1987) (requiring "compelling state interest" and a "narrowly **2385 drawn" means in context of differential taxation of media); Sable, supra, at 126, 131, 109 S.Ct., at 2836-2837, 2839 (applying "compelling interest," "least restrictive means," and "narrowly tailored" requirements to indecent telephone communications); Turner, 512 U.S., at 641, 114 S.Ct., at 2458 (using "heightened scrutiny" to address content-neutral regulations of cable system broadcasts); Central Hudson Gas & Elec. Corp., 447 U.S., at 566, 100 S.Ct., at 2351 (restriction on commercial speech cannot be "more extensive than is necessary" to serve a "substantial" government interest).

[3][4] This tradition teaches that the First Amendment embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems. This Court, in different contexts, has consistently held that government may directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech. Justices KENNEDY and THOMAS would have us further declare which, among the many applications of the general approach that this Court has developed over the years, we are applying here. But no definitive choice among competing *742 analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes. That is not to say that we reject all the more specific formulations of the standard-they appropriately cover the vast majority of cases involving government regulation of speech. Rather, aware as we are of the changes taking place in the law, the tech-

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nology, and the industrial structure related to telecommunications, see, e.g., Telecommunications Act of 1996, 110 Stat. 56; S.Rep. No. 104-23 (1995); H.R.Rep. No. 104-204 (1995), we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now. See Columbia Broadcasting, 412 U.S., at 102, 93 S.Ct., at 2086 ("The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence"); Pacifica, supra, at 748, 98 S.Ct., at 3039 ("We have long recognized that each medium of expression presents special First Amendment problems"). We therefore think it premature to answer the broad questions that Justices KENNEDY and THOMAS raise in their efforts to find a definitive analogy, deciding, for example, the extent to which private property can be designated a public forum, compare post, at 2409-2410 (KENNEDY, J., concurring in part, concurring in judgment in part, and dissenting in part), with post, at 2426-2427 (THOMAS, J., concurring in judgment in part and dissenting in part); whether public access channels are a public forum, post, at 2409 (opinion of KENNEDY, J.); whether the Government's viewpoint neutral decision to limit a public forum is subject to the same scrutiny as a selective exclusion from a preexisting public forum, post, at 2413-2415 (opinion of KENNEDY, J.); whether exclusion from common carriage must for all purposes be treated like exclusion from a public forum, post, at 2412 (opinion of KENNEDY, J.); and whether the interests of the owners of communications*743 media always subordinate the interests of all other users of a medium, post, at 2421-2422 (opinion of THOMAS, J.).

[5] Rather than decide these issues, we can decide these cases more narrowly, by closely scrutinizing § 10(a) to assure that it properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech. The importance of the interest at stake here-protecting children from exposure to patently offensive depictions of sex; the accommodation of the interests of programmers in maintaining access channels and of cable operators in editing the contents of their channels; the similarity of the problem and its solution to those at issue in *Pacifica*, and the flexibility inherent in an approach that *permits* private cable operators to make editorial decisions, lead us to conclude that § 10(a) is a sufficiently tai-

lored**2386 response to an extraordinarily important problem.

First, the provision before us comes accompanied with an extremely important justification, one that this Court has often found compelling-the need to protect children from exposure to patently offensive sex-related material <u>Sable Communications</u>, 492 U.S., at 126, 109 S.Ct., at 2836-2837; <u>Ginsberg v. New York</u>, 390 U.S. 629, 639-640, 88 S.Ct. 1274, 1280-1281, 20 L.Ed.2d 195 (1968); <u>New York v. Ferber</u>, 458 U.S. 747, 756-757, 102 S.Ct. 3348, 3354-3355, 73 L.Ed.2d 1113 (1982).

Second, the provision arises in a very particular context-congressional permission for cable operators to regulate programming that, but for a previous Act of Congress, would have had no path of access to cable channels free of an operator's control. The First Amendment interests involved are therefore complex, and require a balance between those interests served by the access requirements themselves (increasing the availability of avenues of expression to programmers who otherwise would not have them), H.R.Rep. No. 98-934, at 31-36, and the disadvantage to the First Amendment interests of cable operators and other programmers (those to whom the cable operator would have assigned *744 the channels devoted to access). See Turner. 512 U.S., at 635-637, 114 S.Ct., at 2455-2456.

Third, the problem Congress addressed here is remarkably similar to the problem addressed by the FCC in <u>Pacifica</u>, and the balance Congress struck is commensurate with the balance we approved there. In <u>Pacifica</u> this Court considered a governmental ban of a radio broadcast of "indecent" materials, defined in part, like the provisions before us, to include

"'language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.' "438 U.S., at 732, 98 S.Ct., at 3031 (quoting 56 F. C.C.2d 94, 98 (1975)).

The Court found this ban constitutionally permissible primarily because "broadcasting is uniquely accessible to children" and children were likely listeners to the program there at issue-an afternoon radio broad-

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cast 438 U.S., at 749-750, 98 S.Ct., at 3040. In addition, the Court wrote, "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," id., at 748, 98 S.Ct., at 3040, "[p]atently offensive, indecent material confronts the citizen, not only in public, but also in the privacy of the home," generally without sufficient prior warning to allow the recipient to avert his or her eyes or ears, ibid., and "[a]dults who feel the need may purchase tapes and records or go to theaters and nightclubs" to hear similar performances, id., at 750. n. 28, 98 S.Ct., at 3040, n. 28.

All these factors are present here. Cable television broadcasting, including access channel broadcasting, is as "accessible to children" as over-the-air broadcasting, if not more so. See Heeter, Greenberg, Baldwin, Paugh, Srigley, & Atkin, Parental Influences on Viewing Style, in Cableviewing 140 (C. Heeter & B. Greenberg eds. 1988) (children spend more time watching television and view more channels *745 than do their parents, whether their household subscribes to cable or receives television over the air). Cable television systems, including access channels, "have established a uniquely pervasive presence in the lives of all Americans." Pacifica. supra, at 748, 98 S.Ct., at 3040. See Jost, The Future of Television, 4 The CO Researcher 1131, 1146 (Dec. 23, 1994) (63% of American homes subscribe to cable); Greenberg, Heeter, D'Alessio, & Sipes, Cable and Noncable Viewing Style Comparisons, in Cableviewing, supra, at 207 (cable households spend more of their day, on average, watching television, and will watch more channels, than households without cable service). "Patently offensive" material from these stations can "confron[t] the citizen" in the "privacy of the home," Pacifica, supra, at 748. 98 S.Ct., at 3039-3040. with little or no prior warning. Cableviewing, supra, at 217-218 (while cable subscribers tend to use guides more than do broadcast viewers, there was no difference among these groups in the amount of viewing that was planned, and, in **2387 fact, cable subscribers tended to sample more channels before settling on a program, thereby making them more, not less, susceptible to random exposure to unwanted materials). There is nothing to stop "adults who feel the need" from finding similar programming elsewhere, say, on tape or in theaters. In fact, the power of cable systems to control home program viewing is not absolute. Over-the-air broadcasting and direct broadcast satellites already provide alternative ways for programmers to reach the home

and are likely to do so to a greater extent in the near future. See generally Telecommunications Act of 1996, § 201, 110 Stat. 107 (advanced television services), § 205 (direct broadcast satellite), § 302 (video programming by telephone companies), and § 304 (availability of navigation devices to enhance multichannel programming); L. Johnson, Toward Competition in Cable Television (1994).

Fourth, the permissive nature of § 10(a) means that it likely restricts speech less than, not more than, the ban at issue in Pacifica. The provision removes a restriction as to *746 some speakers-namely, cable operators. See supra, at 2386. Moreover, although the provision does create a risk that a program will not appear, that risk is not the same as the certainty that accompanies a governmental ban. In fact, a glance at the programming that cable operators allow on their own (nonaccess) channels suggests that this distinction is not theoretical, but real. See App. 393 (regular channel broadcast of Playboy and "Real Sex" programming). Finally, the provision's permissive nature brings with it a flexibility that allows cable operators, for example, not to ban broadcasts, but, say, to rearrange broadcast times, better to fit the desires of adult audiences while lessening the risks of harm to children. See First Report and Order ¶ 31, at 1003 (interpreting the Act's provisions to allow cable operators broad discretion over what to do with offensive materials). In all these respects, the permissive nature of the approach taken by Congress renders this measure appropriate as a means of achieving the underlying purpose of protecting children.

Of course, cable system operators may not always rearrange or reschedule patently offensive programming. Sometimes, as petitioners fear, they may ban the programming instead. But the same may be said of Pacifica 's ban. In practice, the FCC's daytime broadcast ban could have become a total ban, depending upon how private operators (programmers, station owners, networks) responded to it. They would have had to decide whether to reschedule the daytime show for nighttime broadcast in light of comparative audience demand and a host of other practical factors that similarly would determine the practical outcomes of the provisions before us. The upshot, in both cases, must be uncertainty as to practical consequences-of the governmental ban in the one case and of the permission in the other. That common uncertainty makes it difficult to say the pro518 U.S. 727, 116 S.Ct. 2374, 135 L.Ed.2d 888, 64 USLW 4706, 96 Cal. Daily Op. Serv. 4792, 96 Daily Journal

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vision here is, in any respect, *more* restrictive than the order in *747 <u>Pacifica</u>. At the same time, in the respects we discussed, the provision is significantly less restrictive.

The existence of this complex balance of interests persuades us that the permissive nature of the provision, coupled with its viewpoint-neutral application, is a constitutionally permissible way to protect children from the type of sexual material that concerned Congress, while accommodating both the First Amendment interests served by the access requirements and those served in restoring to cable operators a degree of the editorial control that Congress removed in 1984.

[6][7] Our basic disagreement with Justice KEN-NEDY is narrow. Like him, we believe that we must scrutinize § 10(a) with the greatest care. Like Justices KENNEDY and THOMAS, we believe that the interest of protecting children that § 10(a) purports to serve is compelling. But we part company with Justice KENNEDY on two issues. First, Justice KEN-NEDY's focus on categorical analysis forces him to disregard the cable system operators' interests. Post, at 2416-2417. We, on the other hand, recognize that in the context of cable broadcast that involves an access requirement (here, its partial removal), and unlike in **2388 most cases where we have explicitly required "narrow tailoring," the expressive interests of cable operators do play a legitimate role. Cf. Turner, 512 U.S., at 636-637, 114 S.Ct., at 2455-2456. While we cannot agree with Justice THOMAS that everything turns on the rights of the cable owner, see post, at 2424-2425, we also cannot agree with Justice KENNEDY that we must ignore the expressive interests of cable operators altogether. Second, Justice KENNEDY's application of a very strict "narrow tailoring" test depends upon an analogy with a category ("the public forum cases"), which has been distilled over time from the similarities of many cases. Rather than seeking an analogy to a category of cases, however, we have looked to the cases themselves. And, as we have said, we found that Pacifica provides the *748 closest analogy and lends considerable support to our conclusion.

Petitioners and Justice KENNEDY, see post, at 2412, 2415, argue that the opposite result is required by two other cases: Sable Communications of Cal. Inc. v. FCC, 492 U.S. 115. 109 S.Ct. 2829. 106 L.Ed.2d 93

(1989), a case in which this Court found unconstitutional a statute that banned "indecent" telephone messages, and Turner, in which this Court stated that cable broadcast receives full First Amendment protection. See 512 U.S., at 637-641, 114 S.Ct., at 2456-2458. The ban at issue in Sable, however, was not only a total governmentally imposed ban on a category of communications, but also involved a communications medium, telephone service, that was significantly less likely to expose children to the banned material, was less intrusive, and allowed for significantly more control over what comes into the home than either broadcasting or the cable transmission system before us. See 492 U.S., at 128, 109 S.Ct.. at 2837-2838. The Court's distinction in Turner, furthermore, between cable and broadcast television, relied on the inapplicability of the spectrum scarcity problem to cable. See 512 U.S., at 637-641, 114 S.Ct., at 2456-2458. While that distinction was relevant in Turner to the justification for structural regulations at issue there (the "must carry" rules), it has little to do with a case that involves the effects of television viewing on children. Those effects are the result of how parents and children view television programming, and how pervasive and intrusive that programming is. In that respect, cable and broadcast television differ little, if at all. See supra, at 2386 Justice KENNEDY would have us decide that all common carriage exclusions are subject to the highest scrutiny, see post, at 2411-2413, and then decide these cases on the basis of categories that provide imprecise analogies rather than on the basis of a more contextual assessment, consistent with our First Amendment tradition, of assessing whether Congress carefully and appropriately addressed a serious prob-

*749 Petitioners also rely on this Court's "public forum" cases. They point to Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S., at 45, 103 S.Ct., at 954-955, a case in which this Court said that "public forums" are "places" that the government "has opened for use by the public as a place for expressive activity," or which "by long tradition ... have been devoted to assembly and debate." Ibid. See also Cornelius v. NAACP Legal Defense & Ed. Fund. Inc., 473 U.S., at 801, 105 S.Ct., at 3448 (assuming public forums may include "private property dedicated to public use"). They add that the Government cannot "enforce a content-based exclusion" from a public forum unless "necessary to serve a compelling state interest" and "narrowly drawn." Perry, supra, at 45.

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103 S.Ct.. at 955. They further argue that the statute's permissive provisions unjustifiably exclude material, on the basis of content, from the "public forum" that the Government has created in the form of access channels. Justice KENNEDY adds by analogy that the decision to exclude certain content from common carriage is similarly subject to strict scrutiny, and here does not satisfy that standard of review. See post, at 2411-2413,2416.

[8][9] For three reasons, however, it is unnecessary, indeed, unwise, for us definitively to decide whether or how to apply the public forum doctrine to leased access channels. First, while it may be that contentbased exclusions from the right to use common carriers could violate the First Amendment, see post, at 2411-2413 (opinion of **2389 KENNEDY, J.), it is not at all clear that the public forum doctrine should be imported wholesale into the area of common carriage regulation. As discussed above, we are wary of the notion that a partial analogy in one context, for which we have developed doctrines, can compel a full range of decisions in such a new and changing area. See supra, at 2383-2386. Second, it is plain from this Court's cases that a public forum "may be created for a limited purpose." Perry, supra, at 46, n. 7. 103 S.Ct., at 955, n. 7; see also Cornelius, supra, at 802, 105 S.Ct., at 3449 ("[T]he government 'is not required to indefinitely retain the open character of the facility' ") *750 quoting Perry, supra, at 46, 103 S.Ct., at 955). Our cases have not yet determined, however, that government's decision to dedicate a public forum to one type of content or another is necessarily subject to the highest level of scrutiny. Must a local government, for example, show a compelling state interest if it builds a band shell in the park and dedicates it solely to classical music (but not to jazz)? The answer is not obvious. Cf. Perry, supra, at 46, n. 7. 103 S.Ct., at 955, n. 7. But, at a minimum, these cases do not require us to answer it. Finally, and most important, the effects of Congress' decision on the interests of programmers, viewers, cable operators, and children are the same, whether we characterize Congress' decision as one that limits access to a public forum, discriminates in common carriage, or constrains speech because of its content. If we consider this particular limitation of indecent television programming acceptable as a constraint on speech, we must no less accept the limitation it places on access to the claimed public forum or on use of a common carrier.

[10][11] Consequently, if one wishes to view the permissive provisions before us through a "public forum" lens, one should view those provisions as limiting the otherwise totally open nature of the forum that leased access channels provide for communication of other than patently offensive sexual material-taking account of the fact that the limitation was imposed in light of experience gained from maintaining a totally open "forum." One must still ask whether the First Amendment forbids the limitation. But unless a label alone were to make a critical First Amendment difference (and we think here it does not), the features of these cases that we have already discussed the Government's interest in protecting children, the "permissive" aspect of the statute, and the nature of the medium-sufficiently justify the "limitation" on the availability of this forum.

Finally, petitioners argue that the definition of the materials subject to the challenged provisions is too vague, thereby granting cable system operators too broad a program-screening*751 authority. Cf. Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982) (citing Grayned v. City of Rockford, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-2299, 33 L.Ed.2d 222 (1972)) (vague laws may lead to arbitrary enforcement); Dombrowski v. Pfister, 380 U.S. 479, 486-487, 85 S.Ct. 1116, 1121, 14 L.Ed.2d 22 (1965) (uncertainty may perniciously chill speech). That definition, however, uses language similar to language previously used by this Court for roughly similar purposes.

The provisions, as augmented by FCC regulations, permit cable system operators to prohibit

"programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 1992 Act, § 10(a), 106 Stat. 1486.

See also 47 CFR § 76.702 (1995) (reading approximately the same definition into § 10(c)). This language is similar to language adopted by this Court in *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607. 2614-2615, 37 L. Ed.2d 419 (1973), as a "guidelin[e]" for identifying materials that States may constitutionally regulate as obscene. In *Miller*, the Court defined

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obscene sexual material (material that lacks First Amendment protection) in terms of

"(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest ...; (b) whether the work depicts or describes, in a **2390 patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

1bid. (emphasis added; internal quotation marks omitted).

The language, while vague, attempts to identify the category of materials that Justice Stewart thought could be described only in terms of "I know it when I see it." <u>Jacobellis v. Ohio. 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L.Ed.2d 793 (1964)</u> (concurring opinion). In *752 § 10(a) and the FCC regulations, without <u>Miller's</u> qualifiers, the language would seem to refer to material that would be offensive enough to fall within that category but for the fact that the material also has "serious literary, artistic, political or scientific value" or nonprurient purposes.

[12] This history suggests that the statute's language aims at the kind of programming to which its sponsors referred-pictures of oral sex, bestiality, and rape, see 138 Cong. Rec. 981, 985 (1992) (statement of Sen. Helms)-and not at scientific or educational programs (at least unless done with a highly unusual lack of concern for viewer reaction). Moreover, as this Court pointed out in Pacifica, what is "patently offensive" depends on context (the kind of program on which it appears), degree (not "an occasional expletive"), and time of broadcast (a "pig" is offensive in "the parlor" but not the "barnyard"). 438 U.S., at 748. 750. 98 S.Ct., at 3039-3040, 3041. Programming at 2 o'clock in the morning is seen by a basically adult audience and the "patently offensive" must be defined with that fact in mind.

[13] Further, the statute protects against overly broad application of its standards insofar as it permits cable system operators to screen programs only pursuant to a "written and published policy." 1992 Act, § 10(a), 106 Stat. 1486. A cable system operator would find it difficult to show that a leased access program prohibition reflects a rational "policy" if the operator permits similarly "offensive" programming to run elsewhere on its system at comparable times or in compa-

rable ways. We concede that the statute's protection against overly broad application is somewhat diminished by the fact that it permits a cable operator to ban programming that the operator "reasonably believes" is patently offensive. Ibid. (emphasis added). But the "reasonablfel belieff]" qualifier here, as elsewhere in the law, seems designed not to expand the category at which the law aims, but, rather, to provide a legal excuse, for (at least) one honest mistake, from liability that might otherwise attach. Cf. *753Waters v. Churchill, 511 U.S. 661, 682, 114 S.Ct. 1878, 1891, 128 L.Ed.2d 686 (1994) (SOUTER, J., concurring) (public employer's reasonable belief that employee engaged in unprotected speech excuses liability); United States v. United States Gypsum Co., 438 U.S. 422, 453-455, and n. 29, 98 S.Ct. 2864, 2881-2882, and n. 29, 57 L.Ed.2d 854 (1978) (" 'meeting competition' " defense in antitrust based on reasonable belief in the necessity to meet competition); Pierson v. Rav. 386 U.S. 547. 555-557, 87 S.Ct. 1213, 1218-1219, 18 L.Ed.2d 288 (1967) (police officer has defense to constitutional claim, as did officers of the peace at common law in actions for false arrest, when the officer reasonably believed the statute whose violation precipitated the arrest was valid). And the contours of the shieldreasonableness-constrain the discretion of the cable operator as much as they protect it. If, for example, a court had already found substantially similar programming to be beyond the pale of "patently offensive" material, or if a local authority overseeing the local public, governmental, or educational channels had indicated that materials of the type that the cable operator decides to ban were not "patently offensive" in that community, then the cable operator would be hard pressed to claim that the exclusion of the material was "reasonable." We conclude that the statute is not impermissibly vague.

For the reasons discussed, we conclude that § 10(a) is consistent with the First Amendment.

III

The statute's second provision significantly differs from the first, for it does not simply permit, but rather requires, cable system **2391 operators to restrict speech-by segregating and blocking "patently offensive" sex-related material appearing on leased channels (but not on other channels). 1992 Act, § 10(b). In particular, as previously mentioned, see *supra*, at

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2381-2382, this provision and its implementing regulations require cable system operators to place "patently offensive" leased channel programming on a separate channel; to block that channel; to unblock the channel within 30 days of a subscriber's written request for access; and to *754 reblock the channel within 30 days of a subscriber's request for reblocking. 1992 Act, § 10(b); 47 CFR §§ 76.701(b), (c), (g) (1995). Also, leased channel programmers must notify cable operators of an intended "patently offensive" broadcast up to 30 days before its scheduled broadcast date. §§ 76.701(d), (g).

These requirements have obvious restrictive effects. The several up to-30-day delays, along with single channel segregation, mean that a subscriber cannot decide to watch a single program without considerable advance planning and without letting the "patently offensive" channel in its entirety invade his household for days, perhaps weeks, at a time. These restrictions will prevent programmers from broadcasting to viewers who select programs day by day (or, through "surfing," minute by minute); to viewers who would like occasionally to watch a few, but not many, of the programs on the "patently offensive" channel; and to viewers who simply tend to judge a program's value through channel reputation, i.e., by the company it keeps. Moreover, the "written notice" requirement will further restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the "patently offensive" channel. Cf. Lamont v. Postmaster General, 381 U.S. 301, 307, 85 S.Ct. 1493, 1497-1498, 14 L.Ed.2d 398 (1965) (finding unconstitutional a requirement that recipients of Communist literature notify the Post Office that they wish to receive it). Further, the added costs and burdens that these requirements impose upon a cable system operator may encourage that operator to ban programming that the operator would otherwise permit to run, even if only late at night.

The Government argues that, despite these adverse consequences, the "segregate and block" requirements are lawful because they are "the least restrictive means of realizing" a "'compelling interest,'" namely, "'protecting the physical and psychological well-being of minors.' "See Brief for Federal Respondents 11 (quoting <u>Sable</u>, 492 U.S., at 126, 109 <u>S.Ct.</u>, at 2836-2837). *755 It adds that, in any event, the First Amendment, as applied in <u>Pacifica</u>, "does

not require that regulations of indecency on television be subject to the strictest" First Amendment "standard of review." Brief for Federal Respondents 11.

[14] We agree with the Government that protection of children is a "compelling interest." See supra, at 2386. But we do not agree that the "segregate and block" requirements properly accommodate the speech restrictions they impose and the legitimate objective they seek to attain. Nor need we here determine whether, or the extent to which, Pacifica does, or does not, impose some lesser standard of review where indecent speech is at issue, compare 438 U.S., at 745-748, 98 S.Ct., at 3038-3040 (opinion of STEVENS, J.) (indecent materials enjoy lesser First Amendment protection), with id., at 761-762. 98 S.Ct., at 3046-3047 (Powell, J., concurring in part and concurring in judgment) (refusing to accept a lesser standard for nonobscene, indecent material). That is because once one examines this governmental restriction, it becomes apparent that, not only is it not a "least restrictive alternative" and is not "narrowly tailored" to meet its legitimate objective, it also seems considerably "more extensive than necessary." That is to say, it fails to satisfy this Court's formulations of the First Amendment's "strictest," as well as its somewhat less "strict," requirements. See, e.g., Sable. 492 U.S., at 126, 109 S.Ct., at 2836-2837 ("compelling interest" and "least restrictive means" requirements applied to indecent telephone communications); id., at 131, 109 S.Ct., at 2839 (requiring "narrowly tailored" law); Turner, 512 U.S., at 641, 114 S.Ct., at 2458 (using "heightened scrutiny" to address content-neutral structural regulations of cable systems); **2392 id. at 662, 114 S.Ct., at 2469 (quoting " 'no greater than ... essential' " language from United States v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968), as an example of "heightened," less-than-strictest, First Amendment scrutiny); Central Hudson, 447 U.S., at 566, 100 S.Ct., at 2351 (restriction on commercial speech cannot be "more extensive than is necessary"); Florida Bar v. Went For It, Inc., 515 U.S. 618, 624, 115 S.Ct. 2371. 2376, 132 L.Ed.2d 541 (1995) (restriction must be "narrowly drawn"); id. at 632, 115 S.Ct., at 2380 (there must be a *756 "reasonable" "fit" with the objective that legitimates speech restriction). The provision before us does not reveal the caution and care that the standards underlying these various verbal formulas impose upon laws that seek to reconcile the critically important interest in protecting free speech with very important, or even compelling, in518 U.S. 727, 116 S.Ct. 2374, 135 L.Ed.2d 888, 64 USLW 4706, 96 Cal. Daily Op. Serv. 4792, 96 Daily Journal D.A.R. 7697, 3 Communications Reg. (P&F) 545 (Cite as: 518 U.S. 727, 116 S.Ct. 2374)

terests that sometimes warrant restrictions.

Several circumstances lead us to this conclusion. For one thing, the law, as recently amended, uses other means to protect children from similar "patently offensive" material broadcast on unleased cable channels, i.e., broadcast over any of a system's numerous ordinary, or public access, channels. The law, as recently amended, requires cable operators to "scramble or ... block" such programming on any (unleased) channel "primarily dedicated to sexually-oriented programming." Telecommunications Act of 1996, § 505, 110 Stat. 136 (emphasis added). In addition, cable operators must honor a subscriber's request to block any, or all, programs on any channel to which he or she does not wish to subscribe. § 504, ibid. And manufacturers, in the future, will have to make television sets with a so-called "V-chip"-a device that will be able automatically to identify and block sexually explicit or violent programs. § 551, id., at 139-142.

Although we cannot, and do not, decide whether the new provisions are themselves lawful (a matter not before us), we note that they are significantly less restrictive than the provision here at issue. They do not force the viewer to receive (for days or weeks at a time) all "patently offensive" programming or none; they will not lead the viewer automatically to judge the few by the reputation of the many; and they will not automatically place the occasional viewer's name on a special list. They therefore inevitably lead us to ask why, if they adequately protect children from "patently offensive" material broadcast on ordinary channels, they would not offer adequate protection from similar leased channel broadcasts as well? Alternatively, if these provisions*757 do not adequately protect children from "patently offensive" material broadcast on ordinary channels, how could one justify more severe leased channel restrictions when (given ordinary channel programming) they would yield so little additional protection for children?

The record does not answer these questions. It does not explain why, under the new Act, blocking alone-without written access requests-adequately protects children from exposure to regular sex-dedicated channels, but cannot adequately protect those children from programming on similarly sex-dedicated channels that are leased. It does not explain why a simple subscriber blocking request system, perhaps a

phone-call-based system, would adequately protect children from "patently offensive" material broadcast on ordinary non-sex-dedicated channels (i.e., almost all channels) but a far more restrictive segregate/block/written-access system is needed to protect children from similar broadcasts on what (in the absence of the segregation requirement) would be non-sex-dedicated channels that are leased. Nor is there any indication Congress thought the new ordinary channel protections less than adequate.

The answers to the questions are not obvious. We have no empirical reason to believe, for example, that sex-dedicated channels are all (or mostly) leased channels, or that "patently offensive" programming on non-sex-dedicated channels is found only (or mostly) on leased channels. To the contrary, the parties' briefs (and major city television guides) provide examples of what seems likely to be such programming broadcast over both kinds of channels.

**2393 [15] We recognize, as the Government properly points out that Congress need not deal with every problem at once. Cf. Semler v. Oregon Bd. of Dental Examiners, 294 U.S. 608, 610, 55 S.Ct. 570. 571. 79 L.Ed. 1086 (1935) (the legislature need not "strike at all evils at the same time"); and Congress also must have a degree of leeway in tailoring means to ends. Columbia Broadcasting. 412 U.S., at 102-103, 93 S.Ct., at 2086-2087. But in light of the 1996 statute, it seems *758 fair to say that Congress now has tried to deal with most of the problem. At this point, we can take Congress' different, and significantly less restrictive, treatment of a highly similar problem at least as some indication that more restrictive means are not "essential" (or will not prove very helpful). Cf. Boos v. Barry, 485 U.S. 312, 329, 108 S.Ct. 1157, 1168, 99 L.Ed.2d 333 (1988) (existence of a less restrictive statute suggested that a challenged ordinance, aimed at the same problem, was overly restrictive).

The record's description and discussion of a different alternative-the "lockbox"-leads, through a different route, to a similar conclusion. The Cable Communications Policy Act of 1984 required cable operators to provide

"upon the request of a subscriber, a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by the sub-

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scriber." 47 U.S.C. § 544(d)(2).

This device-the "lockbox"-would help protect children by permitting their parents to "lock out" those programs or channels that they did not want their children to see. See FCC 85-179. ¶ 132, 50 Fed.Reg. 18637. 18655 (1985) ("[T]he provision for lockboxes largely disposes of issues involving the Commission's standard for indecency"). The FCC, in upholding the "segregate and block" provisions, said that lockboxes protected children (including, say, children with inattentive parents) less effectively than those provisions. See First Report and Order ¶ 14-15.8 FCC Rcd. at 1000. But it is important to understand why that is so.

The Government sets forth the reasons as follows:

"In the case of lockboxes, parents would have to discover that such devices exist; find out that their cable operators offer them for sale; spend the time and money to buy one; learn how to program the lockbox to block undesired programs; and, finally, exercise sufficient vigilance to ensure that they have, indeed, locked out *759 whatever indecent programming they do not wish their children to view." Brief for Federal Respondents 37.

We assume the accuracy of this statement. But the reasons do not show need for a provision as restrictive as the one before us. Rather, they suggest a set of provisions very much like those that Congress placed in the 1996 Act.

No provision, we concede, short of an absolute ban, can offer certain protection against assault by a determined child. We have not, however, generally allowed this fact alone to justify " ' "reduc[ing] the adult population ... to ... only what is fit for children." " Sable, 492 U.S., at 128, 109 S.Ct., at 2837 (quoting Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 73, 103 S.Ct, 2875, 2883-2884, 77 L.Ed.2d 469 (1983), in turn quoting Butler v. Michigan, 352 U.S. 380, 383, 77 S.Ct. 524, 525-526, 1 L.Ed.2d 412 (1957)); see Sable, supra, at 130, and n. 10, 109 S.Ct., at 2839, and n. 10. But, leaving that problem aside, the Government's list of practical difficulties would seem to call, not for "segregate and block" requirements, but, rather, for informational requirements, for a simple coding system, for readily available blocking equipment (perhaps accessible by telephone), for imposing cost burdens upon system operators (who may spread them through subscription fees); or perhaps even for a system that requires lockbox defaults to be set to block certain channels (say, sex-dedicated channels). These kinds of requirements resemble those that Congress has recently imposed upon all but leased channels. For that reason, the "lockbox" description and the discussion of its frailties reinforces our conclusion that the leased channel provision is overly restrictive when measured against the benefits it is likely to achieve. (We add that the record's discussion of the "lockbox" does not explain why the law now treats leased **2394 channels more restrictively than ordinary channels.)

[16] There may, of course, be other explanations. Congress may simply not have bothered to change the leased channel provisions when it introduced a new system for other channels. But responses of this sort, like guesses about the comparative seriousness of the problem, are not legally adequate. *760 In other cases, where, as here, the record before Congress or before an agency provides no convincing explanation, this Court has not been willing to stretch the limits of the plausible, to create hypothetical nonobvious explanations in order to justify laws that impose significant restrictions upon speech. See, e.g., Sable, supra, at 130, 109 S.Ct., at 2838 ("[T]he congressional record presented to us contains no evidence as to how effective or ineffective the FCC's most recent regulations were or might prove to be"); Simon & Schuster, 502 U.S., at 120, 112 S.Ct., at 510-511; Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585-586, 103 S.Ct. 1365, 1371-1373, 75 L,Ed.2d 295 (1983); Arkansas Writers' Project, 481 U.S., at 231-232, 107 S.Ct., at 1728-1729.

Consequently, we cannot find that the "segregate and block" restrictions on speech are a narrowly, or reasonably, tailored effort to protect children. Rather, they are overly restrictive, "sacrific[ing]" important First Amendment interests for too "speculative a gain." Columbia Broadcasting. 412 U.S., at 127, 93 S.Ct., at 2099; see League of Women Voters, 468 U.S., at 397, 104 S.Ct., at 3126. For that reason they are not consistent with the First Amendment.

ΙV

The statute's third provision, as implemented by FCC

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regulation, is similar to its first provision, in that it too *permits* a cable operator to prevent transmission of "patently offensive" programming, in this case on public access channels. 1992 Act, § 10(c); 47 CFR § 76.702 (1995). But there are four important differences.

The first is the historical background. As Justice KENNEDY points out, see post, at 2407-2409, cable operators have traditionally agreed to reserve channel capacity for public, governmental, and educational channels as part of the consideration they give municipalities that award them cable franchises. See H.R.Rep. No. 98-934, at 30. In the terms preferred by Justice THOMAS, see post, at 2426-2427, the requirement to reserve capacity for public access channels is similar to the reservation of a public easement, or a dedication*761 of land for streets and parks, as part of a municipality's approval of a subdivision of land. Cf. post, at 2410 (opinion of KENNEDY, J.). Significantly, these are channels over which cable operators have not historically exercised editorial control. H.R.Rep. No. 98-934, supra, at 30. Unlike § 10(a) therefore, § 10(c) does not restore to cable operators editorial rights that they once had, and the countervailing First Amendment interest is nonexistent, or at least much diminished. See also post, at 2409-2410 (opinion of KENNEDY, J.).

The second difference is the institutional background that has developed as a result of the historical difference. When a "leased channel" is made available by the operator to a private lessee, the lessee has total control of programming during the leased time slot. See 47 U.S.C. § 532(c)(2). Public access channels, on the other hand, are normally subject to complex supervisory systems of various sorts, often with both public and private elements. See § 531(b) (franchising authorities "may require rules and procedures for the use of the [public access] channel capacity"). Municipalities generally provide in their cable franchising agreements for an access channel manager, who is most commonly a nonprofit organization, but may also be the municipality, or, in some instances, the cable system owner. See D. Brenner, M. Price, & M. Myerson, Cable Television and Other Nonbroadcast Video ¶ 6.04 [7] (1993); P. Aufderheide, Public Access Cable Programming, Controversial Speech, and Free Expression (1992) (hereinafter Aufderheide), reprinted in App. 61, 63 (surveying 61 communities; the access manager was: a nonprofit organization in 41, a local government **2395 official in 12, the cable operator in 5, and an unidentified entity in 3); D. Agosta, C. Rogoff, & A. Norman, The Participate Report: A Case Study of Public Access Cable Television in New York State 28 (1990) (hereinafter Agosta), attached as Exh. K to Joint Comments for the Alliance for Community Media et al., filed with the FCC under MM Docket No. 92-258*762 (materials so filed hereinafter FCC Record) ("In 88% [of New York public access systems] access channels were programmed jointly between the cable operator and another institution such as a university, library, or non-profit access organization"); id, at 28-32, FCC Record; Comments of National Cable Television Association Inc., at 14, FCC Record ("Operators often have no involvement in PEG channels that are run by local access organizations"). Access channel activity and management are partly financed with public funds-through franchise fees or other payments pursuant to the franchise agreement, or from general municipal funds, see Brenner, Price, & Myerson, supra, § 6.04[3][c]; Aufderheide, App. 59-60-and are commonly subject to supervision by a local supervisory board. See, e.g., D.C.Code Ann. § 43-1829 (1990 and Supp. 1996); Lynchburg City Code § 12.1-44(d)(2) (1988).

This system of public, private, and mixed nonprofit elements, through its supervising boards and nonprofit or governmental access managers, can set programming policy and approve or disapprove particular programming services. And this system can police that policy by, for example, requiring indemnification by programmers, certification of compliance with local standards, time segregation, adult content advisories, or even by prescreening individual programs. See Second Report and Order ¶ 26, 8 FCC Rcd. at 2642 ("[F]rom the comments received, it appears that a number of access organizations already have in place procedures that require certification statements [of compliance with local standards], or their equivalent, from access programmers"); Comments of Boston Community Access and Programming Foundation, App. 163-164; Aufderheide, id., at 69-71; Comments of Metropolitan Area Communications Commission 2, FCC Record; Reply Comments of Waycross Community Television 4-6, FCC Record; Reply Comments of Columbus Community Cable Access, Inc., App. 329; Reply Comments of City of St. Paul, id., at 318, 325; Reply Comments of Erik *763 Mollberg, Public Access Coordinator, Ft. Wayne, Ind., 3, FCC Record; Comments of Defiance

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Community Television 3, FCC Record; Comments of Nutmeg Public Access Television, Inc., 3-4, FCC Record. Whether these locally accountable bodies prescreen programming, promulgate rules for the use of public access channels, or are merely available to respond when problems arise, the upshot is the same: There is a locally accountable body capable of addressing the problem, should it arise, of patently offensive programming broadcast to children, making it unlikely that many children will in fact be exposed to programming considered patently offensive in that community. See 56 F.3d, at 127-128; Second Report and Order ¶ 26, 8 FCC Rcd 2642.

Third, the existence of a system aimed at encouraging and securing programming that the community considers valuable strongly suggests that a "cable operator's veto" is less likely necessary to achieve the statute's basic objective, protecting children, than a similar veto in the context of leased channels. Of course, the system of access managers and supervising boards can make mistakes, which the operator might in some cases correct with its veto power. Balanced against this potential benefit, however, is the risk that the veto itself may be mistaken; and its use, or threatened use, could prevent the presentation of programming, that, though borderline, is not "patently offensive" to its targeted audience. See Aufderheide, App. 64-66 (describing the programs that were considered borderline by access managers, including sex education, health education, broadcasts of politically marginal groups, and various artistic experiments). And this latter threat must bulk large within a system that already has publicly accountable systems for maintaining responsible programs.

Finally, our examination of the legislative history and the record before us is consistent with what common sense suggests, namely, that the public/nonprofit programming control systems now in place would normally **2396 avoid, minimize, or *764 eliminate any child-related problems concerning "patently offensive" programming. We have found anecdotal references to what seem isolated instances of potentially indecent programming, some of which may well have occurred on leased, not public access, channels. See 138 Cong. Rec. 984, 990 (1992) (statement of Sen. Wirth) (mentioning "abuses" on Time Warner's New York City channel); but see Comments of Manhattan Neighborhood Network, App. 235, 238 (New York access manager noting that leased, not public access,

channels regularly carry sexually explicit programming in New York, and that no commercial programs or advertising are allowed on public access channels); Brief for Time Warner Cable as Amicus Curiae 2-3 (indicating that relevant "abuses" likely occurred on leased channels). See also 138 Cong. Rec., at 989 (statement of Sen. Fowler) (describing solicitation of prostitution); id., at 985 (statement of Sen. Helms) (identifying newspaper headline referring to mayor's protest of a "strip act"); 56 F.3d. at 117-118 (recounting comments submitted to the FCC describing three complaints of offensive programming); Letter from Mayor of Rancho Palos Verdes, FCC Record; Resolution of San Antonio City Council, No. 92-49-40, FCC Record.

But these few examples do not necessarily indicate a significant nationwide pattern. See 56 F.3d. at 127-128 (public access channels "did not pose dangers on the order of magnitude of those identified on leased access channels," and "local franchising authorities could respond" to such problems "by issuing 'rules and procedures' or other 'requirements' "). The Commission itself did not report any examples of "indecent" programs on public access channels. See Second Report and Order, 8 FCC Rcd. at 2638; see also Comments of Boston Community Access and Programming Foundation, App. 162-163 (noting that the FCC's Notice of Proposed Rulemaking, 7 FCC Rcd_7709 (1992), did not identify any "inappropriate" programming that actually exists on public *765 access channels). Moreover, comments submitted to the FCC undermine any suggestion that prior to 1992 there were significant problems of indecent programming on public access channels. See Agosta 10, 28, FCC Record (surveying 76 public access systems in New York over two years, and finding "only two examples of controversial programming, and both had been settled by the producers and the access channel"); Reply Comments of Staten Island Community Television 2, FCC Record ("Our access channels have been on the air since 1986 without a single incident which would be covered by Section 10 of the new law"); Reply Comments of Waycross Community Television, at 2, FCC Record ("[I]ndecent and obscene programs ... [have] never been cablecast through Waycross Community Television during our entire ten year programming history"); Reply Comments of Cambridge Community Television, App. 314 ("In Cambridge less than one hour out of 15,000 hours of programming CCTV has run in the past five year[s] may have been affected by

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the Act"); *ibid*. ("CCTV feels that there simply is not a problem which needs to be fixed"); Reply Comments of Columbus Community Cable Access, Inc., *id.*, at 329 ("ACTV is unaware of any actions taken by the cable operators under [a local law authorizing them to prohibit "legally obscene matter"] within the last 10 years"); Reply Comments of Cincinnati Community Video, Inc., *id.*, at 316 ("[I]n 10 years of access operations with over 30,000 access programs cablecast not a single obscenity violation has ever occurred"); Comments of Defiance Community Television, at 2-3, FCC Record (in eight years of operation, "there has never been a serious problem with the content of programming on the channel").

At most, we have found borderline examples as to which people's judgment may differ, perhaps acceptable in some communities but not others, of the type that petitioners fear the law might prohibit. See, e.g., Aufderheide, App. 64-66; Brief for Petitioners in No. 95-124, p. 7 (describing depiction *766 of a self-help gynecological examination); Comments of Time Warner Entertainment Co., App. 252 (describing an Austin, Tex., program that included "nude scenes from a movie," and an Indianapolis, Ind., " 'safe sex' " program). It is difficult to see how such **2397 borderline examples could show a compelling need, nationally, to protect children from significantly harmful materials. Compare 138 Cong. Rec., at 985 (statement of Sen. Helms) (justifying regulation of leased access channels in terms of programming that depicts "bestiality" and "rape"). In the absence of a factual basis substantiating the harm and the efficacy of its proposed cure, we cannot assume that the harm exists or that the regulation redresses it. See Turner, 512 U.S., at 664-665, 114 S.Ct., at 2470-2471.

[17] The upshot, in respect to the public access channels, is a law that could radically change present programming-related relationships among local community and nonprofit supervising boards and access managers, which relationships are established through municipal law, regulation, and contract. In doing so, it would not significantly restore editorial rights of cable operators, but would greatly increase the risk that certain categories of programming (say, borderline offensive programs) will not appear. At the same time, given present supervisory mechanisms, the need for this particular provision, aimed directly at public access channels, is not obvious. Having carefully reviewed the legislative history of

the Act, the proceedings before the FCC, the record below, and the submissions of the parties and *amici* here, we conclude that the Government cannot sustain its burden of showing that § 10(c) is necessary to protect children or that it is appropriately tailored to secure that end. See, e.g., Columbia Broadcasting. 412 U.S., at 127. 93 S.Ct., at 2098-2099: League of Women Yoters, 468 U.S., at 398-399, 104 S.Ct., at 3126-3127; Sable, 492 U.S., at 126, 109 S.Ct., at 2836-2837. Consequently, we find that this third provision violates the First Amendment.

*767 V

[18] Finally, we must ask whether § 10(a) is severable from the two other provisions. The question is one of legislative intent: Would Congress still "have passed" § 10(a) "had it known" that the remaining "provision[s were] invalid"? Brockett v. Spokane Arcades. Inc. 472 U.S. 491. 506. 105 S.Ct. 2794. 2803. 86 L.Ed.2d 394 (1985). If so, we need not invalidate all three provisions. New York v. Ferber. 458 U.S., at 769. n. 24, 102 S.Ct., at 3361, n. 24 (citing United States v. Thirty-Seven Photographs. 402 U.S. 363. 91 S.Ct. 1400. 28 L.Ed.2d 822 (1971)).

[19] Although the 1992 Act contains no express "severability clause," we can find the Act's "severability" intention in its structure and purpose. It seems fairly obvious Congress would have intended its permissive "leased access" channels provision, § 10(a), to stand irrespective of § 10(c)'s legal fate. That is because the latter provision concerns only public, educational, and governmental channels. Its presence had little, if any, effect upon "leased access" channels; hence its absence in respect to those channels could not make a significant difference.

The "segregate and block" requirement's invalidity does make a difference, however, to the effectiveness of the permissive "leased access" provision, § 10(a). Together they told the cable system operator: "Either ban a 'patently offensive' program or 'segregate and block' it." Without the "segregate and block" provision, cable operators are afforded broad discretion over what to do with a patently offensive program, and because they will no longer bear the costs of segregation and blocking if they refuse to ban such programs, cable operators may choose to ban fewer programs.

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Nonetheless, this difference does not make the two provisions unseverable. Without the "segregate and block" provision, the law simply treats leased channels (in respect to patently offensive programming) just as it treats all other channels. And judging by the absence of similar segregate and block provisions in the context of these other channels, Congress would probably have thought that § 10(a), standing *768 alone, was an effective (though, perhaps, not the most effective) means of pursuing its objective. Moreover, we can find no reason why, in light of Congress' basic objective (the protection of children), Congress would have preferred no provisions at all to the permissive provision standing by itself. That provision, capable of functioning on its own, still helps to achieve **2398 that basic objective. Consequently, we believe the valid provision is severable from the others.

VΙ

For these reasons, the judgment of the Court of Appeals is affirmed insofar as it upheld § 10(a); the judgment of the Court of Appeals is reversed insofar as it upheld § 10(b) and § 10(c).

It is so ordered.
Justice <u>STEVENS</u>, concurring.

The difference between § 10(a) and § 10(c) is the difference between a permit and a prohibition. The former restores the freedom of cable operators to reject indecent programs; the latter requires local franchising authorities to reject such programs. While I join the Court's opinion, I add these comments to emphasize the difference between the two provisions and to endorse the analysis in Part III-B of Justice KENNEDY's opinion even though I do not think it necessary to characterize the public access channels as public fora. Like Justice SOUTER, I am convinced that it would be unwise to take a categorical approach to the resolution of novel First Amendment questions arising in an industry as dynamic as this. Cf. R.A.V. v. St. Paul, 505 U.S. 377, 426-427, 112 S.Ct. 2538. 2566-2567, 120 L.Ed.2d 305 (1992) (STEVENS, J., concurring in judgment).

I

Federal law requires cable system operators to reserve about 15 percent of their channels for commercial lease to unaffiliated programmers. See <u>47 U.S.C.</u>

§ 532(b). On *769 these channels, federal law generally prohibits the cable operator from exercising any control over program content, see § 532(c)(2), with one exception: Section 10(a) allows the operator to refuse to air "indecent" programs. In my view, that exception is permissible.

The Federal Government established the leased access requirements to ensure that certain programmers would have more channels available to them. Section 10(a) is therefore best understood as a limitation on the amount of speech that the Federal Government has spared from the censorial control of the cable operator, rather than a direct prohibition against the communication of speech that, in the absence of federal intervention, would flow freely.

I do not agree, however, that § 10(a) established a public forum. Unlike sidewalks and parks, the Federal Government created leased access channels in the course of its legitimate regulation of the communications industry. In so doing, it did not establish an entirely open forum, but rather restricted access to certain speakers, namely, unaffiliated programmers able to lease the air time. By facilitating certain speech that cable operators would not otherwise carry, the leased access channels operate like the must-carry rules that we considered in *Turner Broadcasting System, Inc. v. FCC.* 512 U.S. 622, 643-646, 114 S.Ct. 2445, 2460-2461, 129 L.Ed.2d 497 (1994), without reference to our public forum precedents.

When the Federal Government opens cable channels that would otherwise be left entirely in private hands, it deserves more deference than a rigid application of the public forum doctrine would allow. At this early stage in the regulation of this developing industry, Congress should not be put to an all or nothing-at-all choice in deciding whether to open certain cable channels to programmers who would otherwise lack the resources to participate in the marketplace of ideas

Just as Congress may legitimately limit access to these channels to unaffiliated programmers, I believe it may also limit, within certain reasonable bounds, the extent of the access*770 that it confers upon those programmers. FNI If the Government had a reasonable **2399 basis for concluding that there were already enough classical musical programs or cartoons being telecast-or, perhaps, even enough politi-

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cal debate-I would find no First Amendment objection to an open access requirement that was extended on an impartial basis to all but those particular subjects. A contrary conclusion would ill-serve First Amendment values by dissuading the Government from creating access rights altogether. FN2

FN1. Our precedents recognize that reasonable restraints may be placed on access to certain well-regulated fora. There is no reason why cable television should be treated differently. See Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829, 115 S.Ct. 2510, 2516-2517, 132 L.Ed.2d 700 (1995); id., at 892-895, 899, 115 S.Ct., at 2547-2549, 2551 (SOUTER, J., dissenting); see also Widmar v. Vincent, 454 U.S. 263, 278, 102 S.Ct. 269, 278-279, 70 L.Ed.2d 440 (1981) (STEVENS, J., concurring in judgment) ("I should think it obvious, for example, that if two groups of 25 students requested the use of a room at a particular time-one to view Mickey Mouse cartoons and the other to rehearse an amateur performance of Hamlet-the First Amendment would not require that the room be reserved for the group that submitted its application first"); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 394, 89 S.Ct. 1794, 1808, 23 L.Ed.2d 371 (1969) (approving access requirement limited to "matters of great public concern").

FN2. For purposes of these cases, canons of constitutional avoidance require us to assume that the Government has the authority to impose leased access requirements on cable operators. Indeed, no party to this litigation contends to the contrary. Because petitioners' constitutional claim depends for its success on the constitutionality of the underlying access rights, they certainly cannot complain if we decide the cases on that assumption.

Of course, the fact that the Federal Government may be entitled to some deference in regulating access for cable programmers does not mean that it may evade First Amendment constraints by selectively choosing which speech should be excepted from private control. If the Government spared all speech but that communicated by Republicans from the control of the cable operator, for example, the First Amendment violation would be plain. See *771Cornelius v. NAACP Legal Defense & Ed. Fund. Inc., 473 U.S. 788, 806. 105 S.Ct. 3439, 3451, 87 L.Ed.2d 567 1985). More subtle viewpoint-based limitations on access also may be prohibited by the First Amendment. See Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 564, 95 S.Ct. 1239, 1249, 43 L.Ed.2d 448 (1975) (Douglas, J., dissenting in part and concurring in result in part).

Even though it is often difficult to determine whether a given access restriction impermissibly singles out certain ideas for repression, in these cases I find no basis for concluding that § 10(a) is a species of viewpoint discrimination. By returning control over indecent programming to the cable operator, § 10(a) treats indecent programming on access channels no differently from indecent programming on regular channels. The decision to permit the operator to determine whether to show indecent programming on access channels therefore cannot be said to reflect a governmental bias against the indecent programming that appears on access channels in particular.

Nor can it be argued that indecent programming has no outlet other than leased access channels, and thus that the exclusion of such speech from special protection is designed to prohibit its communication altogether. Petitioners impliedly concede this point when they contend that the indecency restrictions are arbitrarily underinclusive because they do not affect the similarly indecent programming that appears on regular channels.

Moreover, the criteria § 10(a) identifies for limiting access are fully consistent with the Government's contention that the speech restrictions are not designed to suppress "a certain form of expression that the Government dislikes," post, at 2414 (KENNEDY, J., concurring in part, concurring in judgment in part, and dissenting in part), but rather to protect children from sexually explicit programming on a pervasive medium. In other cases, we have concluded that such a justification is both viewpoint neutral and legitimate. Sable Communications of Cal., Inc. v. FCC. 492 U.S. 115. 109 S.Ct. 2829. 106 L.Ed.2d 93 (1989); *772 FCC v. Pacifica Foundation. 438 U.S. 726. 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978). There is no reason to conclude otherwise here.

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Finally, § 10(a) cannot be assailed on the somewhat broader ground that it nevertheless reduces the programming available to the adult population to what is suitable for children. **2400Butler v. Michigan. 352 U.S. 380, 383, 77 S.Ct. 524, 525-526. 1 L.Ed.2d 412 (1957); post, at 2417 (KENNEDY, J., concurring in part, concurring in judgment in part, and dissenting in part). Section 10(a) serves only to ensure that the newly created access right will not require operators to expose children to more unsuitable communications than would otherwise be the case. It is thus far different in both purpose and effect from the provision at issue in Butler, which criminalized the sale of certain books. 352 U.S., at 381, 77 S.Ct., at 524-525.

In sum, § 10(a) constitutes a reasonable, viewpointneutral limitation on a federally created access right for certain cable programmers. Accordingly, I would affirm the judgment of the Court of Appeals as to this provision.

II

As both Justice BREYER and Justice KENNEDY have explained, the public, educational, and governmental access channels that are regulated by § 10(c) are not creations of the Federal Government. They owe their existence to contracts forged between cable operators and local cable franchising authorities. *Ante*, at 2381, 2394-2395 (opinion of BREYER, J.); post, at 2407-2409, 2409-2410 (KENNEDY, J., concurring in part, concurring in judgment in part, and dissenting in part).

As their name reflects, so-called PEG channels are subject to a variety of local governmental controls and regulations that-apart from any federal requirement-may result either in a prohibition or a requirement that certain types of programs be carried. *Ante*, at 2394-2395 (opinion of BREYER, J.). Presumably, as Justice BREYER explains, the local authorities seldom permit programming of the type described by § 10(c) to air. *Ante*, at 2395.

*773 What is of critical importance to me, however, is that if left to their own devices, those authorities may choose to carry some programming that the Federal Government has decided to restrict. As I read § 10(c), the federal statute would disable local governments from making that choice. It would inject feder-

ally authorized private censors into fora from which they might otherwise be excluded, and it would therefore limit local fora that might otherwise be open to all constitutionally protected speech. FN3

FN3. Although in 1984 Congress essentially barred cable operators from exercising editorial control over PEG channels, see 47 U.S.C. § 531(e), § 10(c) does not merely restore the status quo ante. Section 10(c) authorizes private operators to exercise editorial discretion over "indecent" programming even if the franchising authority objects. Under the pre-1984 practice, local franchising authorities were free to exclude operators from exercising any such control on PEG channels.

Section 10(c) operates as a direct restriction on speech that, in the absence of federal intervention, might flow freely. The Federal Government is therefore not entitled to the same leeway that I believe it deserves when it enacts provisions, such as § 10(a), that define the limits of federally created access rights. See *supra*, at 2398-2399. The Federal Government has no more entitlement to restrict the power of a local authority to disseminate materials on channels of its own creation, than it has to restrict the power of cable operators to do so on channels that they own. In this respect, I agree entirely with Justice KENNEDY, save for his designation of these channels as public fora.

That is not to say that the Federal Government may not impose restrictions on the dissemination of indecent materials on cable television. Although indecent speech is protected by the First Amendment, the Government may have a compelling interest in protecting children from indecent speech on such a pervasive medium. Sable Communications of Cal., Inc. v. FCC. 492 U.S. 115, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989); FCC v. Pacifica Foundation. 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978). When the Government*774 acts to suppress directly the dissemination of such speech, however, it may not rely solely on speculation and conjecture. See Sable Communications of Cal., Inc. v. FCC. 492 U.S., at 129-131, 109 S.Ct., at 2838-2839.

Justice BREYER persuasively demonstrates that the Government has made no effort to identify the harm

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caused by permitting local franchising authorities to determine**2401 the quantum of so-called "indecent" speech that may be aired in their communities. Ante, at 2395-2397. Nor has the Government attempted to determine whether the intervention of the discretionary censorial authority of a private cable operator constitutes an appropriately limited means of addressing that harm. Ibid. Given the direct nature of the restriction on speech that § 10(c) imposes, the Government has failed to carry its burden of justification. Accordingly, I agree that the judgment of the Court of Appeals with respect to § 10(c) should be reversed.

Justice SOUTER, concurring.

Justice KENNEDY's separate opinion stresses the worthy point that First Amendment values generally are well served by categorizing speech protection according to the respective characters of the expression, its context, and the restriction at issue. Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said ^{FNI} Justice KENNEDY sees no warrant in these cases for anything but a categorical and rule-based approach applying a fixed level of scrutiny, the strictest, to judge the content-based provisions of §§ 10(a), (b), and (c), and he accordingly faults the principal opinion *775 for declining to decide the precise doctrinal categories that should govern the issue at hand. The value of the categorical approach generally to First Amendment security prompts a word to explain why I join the Court's unwillingness to announce a definitive categorical analysis in this case.

FN1. See, e.g., Blasi, The Pathological Perspective and the First Amendment, <u>85</u> Colum. L.Rev. 449, 474 (1985) (arguing that "courts ... should place a premium on confining the range of discretion left to future decisionmakers who will be called upon to make judgments when pathological pressures are most intense").

Neither the speech nor the limitation at issue here may be categorized simply by content. Our prior case most nearly on point dealt not with a flat restriction covering a separate category of indecency at the First Amendment's periphery, but with less than a total ban, directed to instances of indecent speech easily available to children through broadcasts readily re-

ceived in the household and difficult or impossible to control without immediate supervision. See FCC v. Pacifica Foundation, 438 U.S. 726, 747, 98 S.Ct. 3026, 3039, 57 L.Ed.2d 1073 (1978) (plurality opinion) ("It is a characteristic of speech such as this that both its capacity to offend and its 'social value' ... vary with the circumstances"). FN2 It is not surprising that so contextually complex a category was not expressly assigned a standard level of scrutiny for reviewing the Government's limitation at issue there. FN3

FN2. Our indecency cases since Pacifica have likewise turned as much on the context or medium of the speech as on its content. See, e.g., Sable Communications of Cal. Inc. v. FCC, 492 U.S. 115, 127-128, 109 S.Ct. 2829, 2837-2838, 106 L.Ed.2d 93 (1989) (distinguishing Pacifica in part on the ground that the telephonic medium at issue was less intrusive than broadcast television); Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47, 54, 106 S.Ct. 925, 932, 89 L.Ed.2d 29 (1986) (permitting zoning regulation of adult theaters based on their "secondary effects"); Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 685-686, 106 S.Ct. 3159, 3165-3166, 92 L.Ed.2d 549 (1986) (upholding restriction on indecent speech in a public school).

FN3. Our analysis of another important strand of the present cases, the right of owners of the means of communication to refuse to serve as conduits for messages they dislike, has been equally contextual. Compare Red Lion Broadcasting Co. v. FCC. 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969) (upholding a right-of-reply requirement in the broadcasting context), with Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974) (rejecting such a requirement for print journalism).

Nor does the fact that we deal in these cases with cable transmission necessarily suggest that a simple category subject*776 to a standard level of scrutiny ought to be recognized at this point; while we have found cable television different from broadcast with respect to the factors justifying intrusive access requirements under the rule in <u>Red Lion Broadcasting</u>

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Co. v. FCC, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969), see Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 638-639, 114 S.Ct. 2445, 2456-2457, 129 L.Ed.2d 497 (1994) (finding that Red Lion 's spectrum scarcity rationale had no application to cable), today's plurality **2402 opinion rightly observes that the characteristics of broadcast radio that rendered indecency particularly threatening in Pacifica, that is, its intrusion into the house and accessibility to children, are also present in the case of cable television, ante, at 2386. It would seem, then, that the appropriate category for cable indecency should be as contextually detailed as the Pacifica example, and settling upon a definitive level-ofscrutiny rule of review for so complex a category would require a subtle judgment; but there is even more to be considered, enough more to demand a subtlety tantamount to prescience.

All of the relevant characteristics of cable are presently in a state of technological and regulatory flux. Recent and far-reaching legislation not only affects the technical feasibility of parental control over children's access to undesirable material, see, e.g., Telecommunications Act of 1996, § 551, 110 Stat. 139-142 (provision for "V-chip" to block sexually explicit or violent programs), but portends fundamental changes in the competitive structure of the industry and, therefore, the ability of individual entities to act as bottlenecks to the free flow of information, see Title III, id, at 114-128 (promoting competition in cable services). As cable and telephone companies begin their competition for control over the single wire that will carry both their services, we can hardly settle rules for review of regulation on the assumption that cable will remain a separable and useful category of First Amendment scrutiny. And as broadcast, cable, and the cybertechnology of the Internet and the World Wide Web approach the day of using a common receiver, we can *777 hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others. FN4

FN4. See, e.g., Lynch, Speedier Access: Cable and Phone Companies Compete, at http://www.usatoday.com/life/cyber/bonus/cb006.htm (June 17, 1996) (describing cable modem technology); Gateway 2000 ships first Destination big screen TV-PC's, at http://

www.gw2k.com/corpinfo/press/1996/destin. htm (Apr. 29, 1996) (describing computer with both cable TV and Internet reception capability).

Accordingly, in charting a course that will permit reasonable regulation in light of the values in competition, we have to accept the likelihood that the media of communication will become less categorical and more protean. Because we cannot be confident that for purposes of judging speech restrictions it will continue to make sense to distinguish cable from other technologies, and because we know that changes in these regulated technologies will enormously alter the structure of regulation itself, we should be shy about saying the final word today about what will be accepted as reasonable tomorrow. In my own ignorance I have to accept the real possibility that "if we had to decide today ... just what the First Amendment should mean in cyberspace, ... we would get it fundamentally wrong." Lessig, The Path of Cyberlaw, 104 Yale L.J. 1743, 1745 (1995).

The upshot of appreciating the fluidity of the subject that Congress must regulate is simply to accept the fact that not every nuance of our old standards will necessarily do for the new technology, and that a proper choice among existing doctrinal categories is not obvious. Rather than definitively settling the issue now, Justice BREYER wisely reasons by direct analogy rather than by rule, concluding that the speech and the restriction at issue in these cases may usefully be measured against the ones at issue in <u>Pacifica. FNS</u> If *778 that means it will take some time before reaching a final method of review for cases like these, there may be consolation in recalling that 16 years passed, from Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), to Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), before the modern obscenity rule jelled; that it took over 40 years, from **2403Hague v. Committee for Industrial Organization. 307 U.S. 496. 59 S.Ct. 954, 83 L.Ed. 1423 (1939), to Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37. 103 S.Ct. 948, 74 L.Ed.2d 794 (1983), for the public forum category to settle out; and that a round halfcentury passed before the clear and present danger of Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247. 63 L.Ed. 470 (1919), evolved into the modern incitement rule of Brandenburg v. Ohio. 395 U.S. 444. 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (per curiam).

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FN5. See, e.g., Sunstein, On Analogical Reasoning, 106 Harv. L.Rev. 741, 786 (1993) (observing that analogical reasoning permits "greater flexibility ... over time"); Sullivan, Post-Liberal Judging: The Roles of Categorization and Balancing, 63 U. Colo. L.Rev. 293, 295, n. 6 (1992) (noting that "once the categories are established ... the categorical mode leads to briefs and arguments that concentrate much more on threshold characterization than on comparative analysis").

I cannot guess how much time will go by until the technologies of communication before us today have matured and their relationships become known. But until a category of indecency can be defined both with reference to the new technology and with a prospect of durability, the job of the courts will be just what Justice BREYER does today: recognizing established First Amendment interests through a close analysis that constrains the Congress, without wholly incapacitating it in all matters of the significance apparent here, maintaining the high value of open communication, measuring the costs of regulation by exact attention to fact, and compiling a pedigree of experience with the changing subject. These are familiar judicial responsibilities in times when we know too little to risk the finality of precision, and attention to them will probably take us through the communications revolution. Maybe the judicial obligation to shoulder these responsibilities can itself be captured by a much older rule, familiar to every doctor of medicine: "First, do no harm."

*779 Justice O'CONNOR, concurring in part and dissenting in part.

I agree that § 10(a) is constitutional and that § 10(b)is unconstitutional, and I join Parts I, II, III, and V, and the judgment in part. I am not persuaded, however, that the asserted "important differences" between §§ 10(a) and 10(c), ante, at 2394, are sufficient to justify striking down § 10(c). I find the features shared by § 10(a), which covers leased access channels, and § 10(c), which covers public access channels, to be more significant than the differences. For that reason, I would find that § 10(c) also withstands constitutional scrutiny.

Both §§ 10(a) and 10(c) serve an important governmental interest: the well-established compelling interest of protecting children from exposure to indecent material. See Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836-2837, 106 L.Ed.2d 93 (1989); Ginsberg v. New York, 390 U.S. 629, 639-640, 88 S.Ct. 1274, 1280-1281, 20 L.Ed.2d 195 (1968). Cable television, like broadcast television, is a medium that is uniquely accessible to children, see ante, at 2386-2387, and, of course, children have equally easy access to public access channels as to leased access channels. By permitting a cable operator to prevent transmission of patently offensive sex-related programming, §§ 10(a) and 10(c) further the interest of protecting children.

Furthermore, both provisions are permissive. Neither presents an outright ban on a category of speech, such as we struck down in Sable Communications of Cal., Inc. v. FCC. supra. Sections 10(a) and 10(c) leave to the cable operator the decision whether to broadcast indecent programming, and, therefore, are less restrictive than an absolute governmental ban. Certainly § 10(c) is not more restrictive than § 10(a) in this regard.

It is also significant that neither § 10(a) nor § 10(c) is more restrictive than the governmental speech restriction we upheld in FCC v. Pacifica Foundation, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978). I agree with Justice BREYER that we should not yet undertake*780 fully to adapt our First Amendment doctrine to the new context we confront here. Because we refrain from doing so, the precedent established by Pacifica offers an important guide. Section 10(c), no less than § 10(a), is within the range of acceptability set by Pacifica. See ante, at 2386-2387.

The distinctions upon which the Court relies in deciding that § 10(c) must fall while § 10(a) survives are not, in my view, constitutionally significant. Much emphasis is placed on the differences in the origins of leased access and public access channels. To be sure, the leased access channels covered by § 10(a) were a product of the Federal Government, while the public access channels at issue in § 10(c) arose as part of the cable **2404 franchises awarded by municipalities, see ante, at 2394-2395, but I am not persuaded that the difference in the origin of the access channels is sufficient to justify upholding § 10(a) and striking down § 10(c). The interest in protecting children remains the same, whether on a leased access channel or a public access channel, and allowing the cable

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operator the option of prohibiting the transmission of indecent speech seems a constitutionally permissible means of addressing that interest. Nor is the fact that public access programming may be subject to supervisory systems in addition to the cable operator, see ante, at 2394-2395, sufficient in my mind to render § 10(c) so ill tailored to its goal as to be unconstitutional.

Given the compelling interest served by § 10(c), its permissive nature, and its fit within our precedent, I would hold § 10(c), like § 10(a), constitutional.

Justice KENNEDY, with whom Justice GINSBURG joins, concurring in part, concurring in the judgment

in part, and dissenting in part.

The plurality opinion, insofar as it upholds § 10(a) of the 1992 Cable Act, is adrift. The opinion treats concepts such as public forum, broadcaster, and common carrier as mere labels rather than as categories with settled legal significance: *781 it applies no standard, and by this omission loses sight of existing First Amendment doctrine. When confronted with a threat to free speech in the context of an emerging technology, we ought to have the discipline to analyze the case by reference to existing elaborations of constant First Amendment principles. This is the essence of the case-by-case approach to ensuring protection of speech under the First Amendment, even in novel settings. Rather than undertake this task, however, the plurality just declares that, all things considered, § 10(a) seems fine I think the implications of our past cases for these cases are clearer than the plurality suggests, and they require us to hold § 10(a) invalid. Though I join Part III of the opinion (there for the Court) striking down § 10(b) of the Act, and concur in the judgment that § 10(c) is unconstitutional, with respect I dissent from the remainder.

I

Two provisions of the 1992 Act, §§ 10(a) and (c), authorize the operator of a cable system to exclude certain programming from two different kinds of channels. Section 10(a) concerns leased access channels. These are channels the cable operator is required by federal law to make available to unaffiliated programmers without exercising any control over program content. The statute allows a cable operator to enforce a written and published policy of prohibiting on these channels any programming it "reasonably believes describes or depicts sexual or

excretory activities or organs in a patently offensive manner as measured by contemporary community standards," speech we can refer to as "indecent programming."

Section 10(c) involves public, educational, and governmental access channels (or PEG access channels, as they are known). These are channels set aside for use by members of the public, governmental authorities, and local school systems. As interpreted by the Federal Communications Commission (FCC), § 10(c) requires the agency to make regulations*782 enabling cable operators to prohibit indecent programming on PEG access channels. See ante, at 2381-2382 (quoting statutory provisions in full and discussing interpretive regulations). FN*

FN* The Telecommunications Act of 1996, §§ 506(a), (b), 110 Stat. 136, 137, permits a cable operator to refuse to transmit any leased or public access program or portion thereof which contains "obscenity, indecency, or nudity." The constitutionality of the 1996 amendments, to the extent they differ from the provisions here, is not before

Though the two provisions differ in significant respects, they have common flaws. In both instances, Congress singles out one sort of speech for vulnerability to private censorship in a context where content-based discrimination is not otherwise permitted. The plurality at least recognizes this as state action, ante, at 2382, avoiding the mistake made by the Court of Appeals, Alliance for Community Media v. FCC. 56 F.3d 105, 112-121 (C.A.D.C.1995). State action lies in the enactment of a statute altering legal relations **2405 between persons, including the selective withdrawal from one group of legal protections against private acts, regardless of whether the private acts are attributable to the State. Cf. Hunter v. Erickson, 393 U.S. 385, 389-390, 89 S.Ct. 557, 559-560, 21 L.Ed.2d 616 (1969) (state action under the Fourteenth Amendment).

The plurality balks at taking the next step, however, which is to advise us what standard it applies to determine whether the state action conforms to the First Amendment. Sections 10(a) and (c) disadvantage nonobscene, indecent programming, a protected category of expression, Sable Communications of Cal.

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Inc. v. FCC, 492 U.S. 115, 126, 109 S.Ct. 2829. 2836-2837, 106 L.Ed.2d 93 (1989), on the basis of its content. The Constitution in general does not tolerate content-based restriction of or discrimination against, speech. R.A.V. v. St. Paul. 505 U.S. 377, 382. 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992) ("Content-based regulations are presumptively invalid"); Carev v. Brown, 447 U.S. 455, 461-463, 100 S.Ct. 2286. 2290-2291. 65 L.Ed.2d 263 (1980); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972). In the *783 realm of speech and expression, the First Amendment envisions the citizen shaping the government, not the reverse; it removes "governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity." Cohen v. California, 403 U.S. 15, 24, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284 (1971). "[E]ach person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622. 641, 114 S.Ct. 2445, 2458, 129 L.Ed.2d 497 (1994). We therefore have given "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." Id., at 642, 114 S.Ct., at 2459.

Sections 10(a) and (c) are unusual. They do not require direct action against speech, but do authorize a cable operator to deny the use of its property to certain forms of speech. As a general matter, a private person may exclude certain speakers from his or her property without violating the First Amendment, Hudgens v. NLRB, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976), and if §§ 10(a) and (c) were no more than affirmations of this principle they might be unremarkable. Access channels, however, are property of the cable operator, dedicated or otherwise reserved for programming of other speakers or the government. A public access channel is a public forum, and laws requiring leased access channels create common-carrier obligations. When the government identifies certain speech on the basis of its content as vulnerable to exclusion from a common carrier or public forum, strict scrutiny applies. These laws cannot survive this exacting review. However compelling Congress' interest in shielding children from indecent programming, the provisions in these cases

are not drawn with enough care to withstand scrutiny under our precedents.

*784 II

Before engaging the complexities of cable access channels and explaining my reasons for thinking all of § 10 unconstitutional, I start with the most disturbing aspect of the plurality opinion: its evasion of any clear legal standard in deciding these cases. See ante, at 2385 (disavowing need to "declare which, among the many applications of the general approach that this Court has developed over the years, we are applying here").

The plurality begins its flight from standards with a number of assertions nobody disputes. I agree, of course, that it would be unwise "to declare a rigid single standard, good for now and for all future media and purposes," ibid. I do think it necessary, however, to decide what standard applies to discrimination against indecent programming on cable access channels in the present state of the industry. We owe at least that much to public and leased access programmers whose speech is put at risk nationwide by these laws.

**2406 In a similar vein, we are admonished, these cases are complicated, not simple; the importance of contextual review, we are told, cannot be evaded by recourse to simple analogies. Ante, at 2384-2386, 2388. All this is true, but use of a standard does not foreclose consideration of context. Indeed, if strict scrutiny is an instance of "judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems,"ante, at 2385, this is a grave indictment of our First Amendment jurisprudence, which relies on strict scrutiny in a number of settings where context is important. I have expressed misgivings about judicial balancing under the First Amendment, see Burson v. Freeman, 504 U.S. 191, 211-212, 112 S.Ct. 1846, 1857-1858. 119 L.Ed.2d 5 (1992) (concurring opinion); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd. 502 U.S. 105, 124-125, 112 S.Ct. 501, 512-513, 116 L.Ed.2d 476 (1991) (opinion concurring in judgment), but strict scrutiny at least confines the balancing process in a manner pro tective of speech; it does not disable government from addressing serious problems, *785 but does ensure that the solutions do not sacrifice speech to a greater extent than neces116 S.Ct. 2374 Page 34

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sary.

The plurality claims its resistance to standards is in keeping with our case law, where we have shown a willingness to be flexible in confronting novel First Amendment problems. The cases it cites, ante, at 2384-2385, however, demonstrate the opposite of what the plurality supposes: In each, we developed specialized or more or less stringent standards when certain contexts demanded them; we did not avoid the use of standards altogether. Indeed, the creation of standards and adherence to them, even when it means affording protection to speech unpopular or distasteful, is the central achievement of our First Amendment jurisprudence. Standards are the means by which we state in advance how to test a law's validity, rather than letting the height of the bar be determined by the apparent exigencies of the day. They also provide notice and fair warning to those who must predict how the courts will respond to attempts to suppress their speech. Yet formulations like strict scrutiny, used in a number of constitutional settings to ensure that the inequities of the moment are subordinated to commitments made for the long run, see Simon & Schuster, supra, at 115-116, 112 S.Ct., at 507-508; Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45, 103 S.Ct. 948, 954-955, 74 L.Ed.2d 794 (1983), mean little if they can be watered down whenever they seem too strong. They mean still less if they can be ignored altogether when considering a case not on all fours with what we have seen before.

The plurality seems distracted by the many changes in technology and competition in the cable industry. See ante, at 2384-2385; ante, at 2401-2402 (SOUTER, J., concurring). The laws challenged here, however, do not retool the structure of the cable industry or (with the exception of § 10(b)) involve intricate technologies. The straightfor ward issue here is whether the Government can deprive certain speakers, on the basis of the content of their speech, of protections afforded*786 all others. There is no reason to discard our existing First Amendment jurisprudence in answering this question.

While it protests against standards, the plurality does seem to favor one formulation of the question in these cases: namely, whether the Act "properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnec-

essarily great restriction on speech." Ante, at 2385. (Though the plurality frowns on any effort to settle on a form of words, it likes this formulation well enough to repeat it; see ante, at 2385.) This description of the question accomplishes little, save to clutter our First Amendment case law by adding an untested rule with an uncertain relationship to the others we use to evaluate laws restricting speech. The plurality cannot bring itself to apply strict scrutiny, yet realizes it cannot decide these cases without uttering some sort of standard; so it has settled for synonyms. "[C]lose judicial scrutiny," ibid, is substituted for strict scrutiny, and "extremely important problem," ante, at 2385, or "extraordinary proble[m]," ante, at 2385, is substituted for "compelling interest." The admonition that the restriction not be unnecessarily**2407 great in light of the interest it serves, ante, at 2385, is substituted for the usual narrow tailoring requirements. All we know about the substitutes is that they are inferior to their antecedents. We are told the Act must be "appropriately tailored," ante, at 2385, "sufficiently tailored," ante, at 2385, or "carefully and appropriately addressed," ante, at 2388, to the problems at hand-anything, evidently, except narrowly tailored.

These restatements have unfortunate consequences. The first is to make principles intended to protect speech easy to manipulate. The words end up being a legalistic cover for an ad hoc balancing of interests; in this respect the plurality succeeds after all in avoiding the use of a standard. Second, the plurality's exercise in pushing around synonyms for the words of our usual standards will sow confusion in the courts bound by our precedents. Those courts, and lawyers in the *787 communications field, now will have to discern what difference there is between the formulation the plurality applies today and our usual strict scrutiny. I can offer little guidance, except to note the unprotective outcome the plurality reaches here. This is why comparisons and analogies to other areas of our First Amendment case law become a responsibility, rather than the luxury the plurality considers them to be. The comparisons provide discipline to the Court and guidance for others, and give clear content to our standards-all the things I find missing in the plurality's opinion. The novelty and complexity of these cases is a reason to look for help from other areas of our First Amendment jurisprudence, not a license to wander into uncharted areas of the law with no compass other than our own opinions about good policy.

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Another troubling aspect of the plurality's approach is its suggestion that Congress has more leeway than usual to enact restrictions on speech where emerging technologies are concerned, because we are unsure what standard should be used to assess them. Justice SOUTER recommends to the Court the precept, "First, do no harm,' " ante, at 2403. The question, though, is whether the harm is in sustaining the law or striking it down. If the plurality is concerned about technology's direction, it ought to begin by allowing speech, not suppressing it. We have before us an urgent claim for relief against content-based discrimination, not a dry run.

I turn now to the issues presented, and explain why strict scrutiny is warranted.

Ш

Α

Cable operators deliver programming from four sources: retransmission of broadcast stations; programming purchased from professional vendors (including national services like ESPN and Nickelodeon) and delivered by satellite; programs*788 created by the cable operator itself; and access channels (PEG and leased), the two kinds of programming at issue here. See Mueller. Note. Controversial Programming on Cable Television's Public Access Channels: The Limits of Governmental Response, 38 DePaul L.Rev. 1051, 1056-1057 (1989) (hereinafter Mueller). See also Turner Broadcasting, 512 U.S., at 628-629, 114 S.Ct., at 2452.

PEG access channels grew out of local initiatives in the late 1960's and early 1970's, before the Federal Government began regulating cable television. Mueller 1061. Local franchising was the first form of cable regulation, arising from the need of localities to control access to public rights-of-way and easements and to minimize disruption to traffic and other public activity from the laying of cable lines. See D. Brenner, M. Price, & M. Meyerson, Cable Television and Other Nonbroadcast Video § 3.01[3] (1996) (hereinafter Brenner); *Turner Broadcasting. supra.* at 628. 114 S.Ct., at 2452 ("[T]he cable medium may depend for its very existence upon express permission from local governing authorities"). A local government would set up a franchise authority to oversee the ca-

ble system and to negotiate a franchise agreement specifying the cable operator's rights and obligations. See Brenner § 3.01; § 3.01[4] (discussing States where local franchising has now been displaced by state regulation). Cf. 47 U.S.C. § 522(10) (defining franchise authority). A franchise, now mandatory under federal law except for systems **2408 operating without them prior to 1984, § 541(b), is an authorization, akin to a license, by a franchise authority permitting the construction or operation of a cable system, § 522(8). From the early 1970's onward, franchise authorities began requiring operators to set aside access channels as a condition of the franchise. See Mueller 1061-1062; D. Agosta, C. Rogoff, & A. Norman, The Participate Report: A Case Study of Public Access Cable Television in New York State 24 (1990) (hereinafter Agosta), attached as Exhibit K to Joint Comments for the Alliance for *789 Community Media et al., filed with the FCC under MM Docket No. 92-258 (hereinafter FCC Record).

The FCC entered the arena in 1972, requiring the cable companies servicing the country's largest television markets to set aside four access channels (one each for public, educational, governmental, and leased programming) by a date certain, and to add channel capacity if necessary to meet the requirement. Cable Television Report and Order, 36 F.C.C.2d 141, 189-198 (1972). See also In re Amendment of Part 76 of the Commission's Rules and Regulations Concerning the Cable Television Channel Capacity and Access Channel Requirements of Section 76.251, 59 F.C.C.2d 294, 303, 321 (1976) (modifying the 1972 rules). We struck down the access rules as beyond the FCC's authority under the Communications Act of 1934. FCC v. Midwest Video Corp., 440 U.S. 689, 708-709, 99 S.Ct. 1435, 1445-1446, 59 L.Ed.2d 692 (1979).

When Congress turned its attention to PEG access channels in 1984, it recognized that "reasonable third-party access to cable systems will mean a wide diversity of information sources for the public-the fundamental goal of the First Amendment-without the need to regulate the content of programming provided over cable." H.R.Rep. No. 98-934. p. 30 (1984), U.S.Code Cong. & Admin.News 1984, p. 4667. It declined, however, to set new federal mandates or authorize the FCC to do so. Since "[a]lmost all recent franchise agreements provide for access by local governments, schools, and non-profit and com-

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munity groups" over some channels, the 1984 Act instead "continue[d] the policy of allowing cities to specify in cable franchises that channel capacity and other facilities be devoted to such use." *Ibid.*

Section 611 of the Communications Act of 1934, added by the Cable Communications Policy Act of 1984 (1984 Act), authorized local franchise authorities to require cable operators to set aside channel capacity for PEG access when seeking new franchises or renewal of old ones. 47 U.S.C. § 531(b). *790 Franchise authorities may enforce franchise agreements, § 531(c), but they lack the power to impose requirements beyond those authorized by federal law, § 531(a). But cf. § 557(a) (grandfathering as valid all pre-1984 franchise agreements for the remainder of their term). Federal law also allows a franchise authority to "require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support." § 541(a)(4)(B). Prior to the passage of § 10(c) of the 1992 Act, the cable operator, save for implementing provisions of its franchise agreement limiting obscene or otherwise constitutionally unprotected cable programming, § 544(d), was forbidden any editorial control over PEG access channels, 47 U.S.C. § 531(e) (1988 ed.).

Congress has not, in the 1984 Act or since, defined what public, educational, or governmental access means or placed substantive limits on the types of programming on those channels. Those tasks are left to franchise agreements, so long as the channels comport in some sense with the industry practice to which Congress referred in the statute.

My principal concern is with public access channels (the P of PEG). These are the channels open to programming by members of the public. Petitioners here include public access programmers and viewers who watch their shows. By contrast, educational and governmental access channels (the E and G of PEG) serve other speakers. Under many franchises, educational channels are controlled by local school systems, which use them to provide school information and educational programs. Governmental access **2409 channels are committed by the cable franchise to the local municipal government, which uses them to distribute information to constituents on public affairs. Mueller 1065-1066. No local governmental entity or school system has petitioned for relief in

these cases, and none of the petitioners who are viewers has asserted an interest in viewing educational or governmental programming or briefed the relevant issues.

*791 B

The public access channels established by franchise agreements tend to have certain traits. They are available at low or no cost to members of the public, often on a first-come, first-served basis. Brenner § 6.04[3][a]-[b], at 6-38. The programmer on one of these channels most often has complete control over, as well as liability for, the content of its show. *Ibid.*, Mueller 1064. The entity managing the technical aspects of public access, such as scheduling and transmission, is not always the cable operator; it may be the local government or a third party that runs the access centers, which are facilities made available for the public to produce programs and transmit them on the access channels. Brenner § 6.04[7], at 6-48.

Public access channels meet the definition of a public forum. We have recognized two kinds of public fora. The first and most familiar are traditional public fora, like streets, sidewalks, and parks, which by custom have long been open for public assembly and discourse. Perry. 460 U.S., at 45, 103 S.Ct., at 954-955; Hague v. Committee for Industrial Organization, 307 U.S. 496. 515, 59 S.Ct. 954, 963-964, 83 L.Ed. 1423 (1939) (opinion of Roberts, J.). "The second category of public property is the designated public forum, whether of a limited or unlimited character-property that the State has opened for expressive activity by part or all of the public." International Soc. for Krishna Consciousness. Inc. v. Lee, 505 U.S. 672, 678, 112 S.Ct. 2701, 2705, 120 L.Ed.2d 541 (1992).

Public access channels fall in the second category. Required by the franchise authority as a condition of the franchise and open to all comers, they are a designated public forum of unlimited character. The House Report for the 1984 Act is consistent with this view. It characterized public access channels as "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace*792 of ideas." H.R.Rep. No. 98-934, supra, at 30,U.S.Code Cong. & Admin.News 1984, p. 4667.

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Public fora do not have to be physical gathering places, Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 830, 115 S.Ct. 2510, 2517, 132 L.Ed.2d 700 (1995), nor are they limited to property owned by the government, Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 800, 105 S.Ct. 3439, 3447-3448, 87 L.Ed.2d 567 (1985). Indeed, in the majority of jurisdictions, title to some of the most traditional of public fora, streets and sidewalks, remains in private hands. 10A E. McQuillin, Law of Municipal Corporations § 30.32 (3d ed.1990); Hague, supra, at 515. 59 S.Ct., at 964 ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"). Public access channels are analogous; they are public fora even though they operate over property to which the cable operator holds title.

It is important to understand that public access channels are public fora created by local or state governments in the cable franchise. Section § 10(c) does not, as the Court of Appeals thought, just return rightful First Amendment discretion to the cable operator, see Alliance for Community Media, 56 F.3d, at 114. Cable operators have First Amendment rights, of course; restrictions on entry into the cable business may be challenged under the First Amendment, Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494, 106 S.Ct. 2034, 2037-2038, 90 L.Ed.2d 480 (1986), and a cable operator's activities in originating programs or exercising editorial discretion over programs others provide on its system also are protected, **2410 Turner Broadcasting, 512 U.S., at 636, 114 S.Ct., at 2456. But cf. id., at 656, 115 S.Ct., at 2466 (distinguishing discretion of cable operators from that of newspaper editors). Yet the editorial discretion of a cable operator is a function of the cable franchise it receives from local government. The operator's right to exercise any editorial discretion over cable service disappears if its franchise is terminated. See 47 U.S.C. § 541(b) (cable service may not *793 be offered without a franchise); § 546 (prescribing procedures and standards for renewal). Cf. Brenner § 3.07[9][a] (franchise terms of 15 years are the norm); § 3.07[15] (typical franchise agreements recognize the absolute right of the franchiser to refuse renewal at expiration of term). If the franchise is transferred to another, so is the right of editorial discretion. The cable operator may own the cables transmitting the

signal, but it is the franchise-the agreement between the cable operator and the local government-that allocates some channels to the full discretion of the cable operator while reserving others for public access.

In providing public access channels under their franchise agreements, cable operators therefore are not exercising their own First Amendment rights. They serve as conduits for the speech of others. Cf. PruneYard Shopping Center v. Robins, 447 U.S. 74, 87, 100 S.Ct. 2035, 2044, 64 L.Ed.2d 741 (1980). Section 10(c) thus restores no power of editorial discretion over public access channels that the cable operator once had; the discretion never existed. It vests the cable operator with a power under federal law, defined by reference to the content of speech, to override the franchise agreement and undercut the public forum the agreement creates. By enacting a law in 1992 excluding indecent programming from protection but retaining the prohibition on cable operators' editorial control over all other protected speech, the Federal Government at the same time ratified the public forum character of public access channels but discriminated against certain speech based on its content.

The plurality refuses to analyze public access channels as public fora because it is reluctant to decide "the extent to which private property can be designated a public forum,"ante, at 2385. We need not decide here any broad issue whether private property can be declared a public forum by simple governmental decree. That is not what happens in the creation of public access channels. Rather, in return for granting cable operators easements to use public rights-of-way*794 for their cable lines, local governments have bargained for a right to use cable lines for public access channels. Justice THOMAS resists public-forum analysis because he sees no evidence of a "formal easement." Post, at 2427. Under general principles of property law, no particular formalities are necessary to create an easement. Easements may be created by contract. 2 G. Thompson, Commentaries on the Modern Law of Real Property §§ 331-332 (1980); 3 H. Tiffany, The Law of Real Property § 776 (3d ed.1939). A franchise agreement is a contract, and in those agreements the cable operator surrenders his power to exclude certain programmers from use of his property for specific purposes. A state court confronted with the issue would likely hold the franchise agreement to create a right of access

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equivalent to an easement in land. So one can even view these cases as a local government's dedication of its own property interest to speech by members of the public. In any event, it seems to me clear that when a local government contracts to use private property for public expressive activity, it creates a public forum.

Treating access channels as public fora does not just place a label on them, as the plurality suggests, see ante, at 2389. It defines the First Amendment rights of speakers seeking to use the channels. When property has been dedicated to public expressive activities, by tradition or government designation, access is protected by the First Amendment. Regulations of speech content in a designated public forum, whether of limited or unlimited character, are "subject to the highest scrutiny" and "survive only if they are narrowly drawn to achieve a compelling state interest." Lee. 505 U.S., at 678, 112 S.Ct., at 2705. Unless there are reasons for applying a lesser standard, § 10(c) must satisfy this stringent review.

**2411 C

Leased access channels, as distinct from public access channels, are those the cable operator must set aside for unaffiliated*795 programmers who pay to transmit shows of their own without the cable operator's creative assistance or editorial approval. In my view, strict scrutiny also applies to § 10(a)'s authorization to cable operators to exclude indecent programming from these channels.

Congress created leased access channels in the 1984 Act. Section 612 of the Act, as amended, requires a cable system with more than 36 channels to set aside a certain percentage of its channels (up to 15%, depending on the size of the system) "for commercial use by persons unaffiliated with the operator." 47 U.S.C. § 532(b)(1). Commercial use means "provision of video programming, whether or not for profit." § 532(b)(5). When an unaffiliated programmer seeks access, the cable operator shall set "the price, terms, and conditions of such use which are at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system,"§ 532(c)(1). Cf. 47 CFR § 76.971 (1995) (rules governing terms and conditions of leased access). The price may not exceed the maximum charged any unaffiliated programmer in the same program category for the use of nonaccess channels. § 76.970. Aggrieved programmers have recourse to federal district court and the FCC (if there are repeated violations) to compel access on appropriate terms. 47 U.S.C. §§ 532(d), (e).

Before 1992, cable operators were forbidden editorial control over any video programming on leased access channels, and could not consider the content of the programming except to set the price of access, 47 U.S.C. § 532(c)(2) (1988 ed.). But cf. 47 U.S.C. § 532(h) (prohibiting programs that are obscene or otherwise unprotected under the Constitution on leased access channels). Section 10(a) of the 1992 Act modifies the no-discretion rule by allowing cable operators to reject, pursuant to a written and published policy, programs they reasonably believe to be indecent. § 532(h). Under § 10(b) of the Act, any indecent programming must be *796 segregated onto one channel and blocked unless the subscriber requests that the channel be provided to him. § 532(j); 47 CFR § 76.701 (1995).

Two distinctions between public and leased access channels are important. First, whereas public access channels are required by state and local franchise authorities (subject to certain federal limitations), leased access channels are created by federal law. Second, whereas cable operators never have had editorial discretion over public access channels under their franchise agreements, the leased access provisions of the 1984 Act take away channels the operator once controlled. Cf. Midwest Video, 440 U.S., at 708. n. 17. 99 S.Ct., at 1445, n. 17 (federal mandates "compelling cable operators indiscriminately to accept access programming will interfere with their determinations regarding the total service offering to be extended to subscribers"). In this sense, § 10(a) now gives back to the operator some of the discretion it had before Congress imposed leased access requirements in the first place.

The constitutionality under <u>Turner Broadcasting</u>, 512 <u>U.S.</u>, at 665-668, 114 S.Ct., at 2470-2471, 2472, of requiring a cable operator to set aside leased access channels is not before us. For purposes of these cases, we should treat the cable operator's rights in these channels as extinguished, and address the issue these petitioners present: namely, whether the Government can discriminate on the basis of content in affording

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protection to certain programmers. I cannot agree with Justice THOMAS, post, at 2423-2424, that the

cable operator's rights inform this analysis.

Laws requiring cable operators to provide leased access are the practical equivalent of making them common carriers, analogous in this respect to telephone companies: They are obliged to provide a conduit for the speech of others. The plurality resists any classification of leased access channels (as created in the 1984 Act) as a common-carrier provision, *ante*, at

2384, although we described in just those *797 terms the access (including leased access) rules promulgated by the FCC in 1976:

**2412 "The access rules plainly impose commoncarrier obligations on cable operators. Under the rules, cable systems are required to hold out dedicated channels on a first-come, nondiscriminatory basis. Operators are prohibited from determining or influencing the content of access programming. And the rules delimit what operators may charge for access and use of equipment." <u>Midwest Video.</u> 440 U.S., at 701-702, 99 S.Ct., at 1442 (citations and footnotes omitted).

Indeed, we struck down the FCC's rules as beyond the agency's statutory authority at the time precisely because they made cable operators common carriers. *Id.* at 702-709, 99 S.Ct., at 1442-1446. The FCC characterizes § 612 as a form of common-carrier requirement, App. to Pet. for Cert. 139a-140a, as does the Government, Brief for Federal Respondents 23.

Section 10(a) authorizes cable operators to ban indecent programming on leased access channels. We have held that a law precluding a common carrier from transmitting protected speech is subject to strict scrutiny, Sable Communications, 492 U.S., at 131, 109 S.Ct., at 2839 (striking down ban on indecent telephonic communications), but we have not had occasion to consider the standard for reviewing a law, such as § 10(a), permitting a carrier in its discretion to exclude specified speech.

Laws removing common-carriage protection from a single form of speech based on its content should be reviewed under the same standard as content-based restrictions on speech in a public forum. Making a cable operator a common carrier does not create a public forum in the sense of taking property from

private control and dedicating it to public use; rather, regulations of a common carrier dictate the manner in which private control is exercised. A commoncarriage *798 mandate, nonetheless, serves the same function as a public forum. It ensures open, nondiscriminatory access to the means of communication. This purpose is evident in the statute itself and in the committee findings supporting it. Congress described the leased access requirements as intended "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems." 47 U.S.C. § 532(a). The House Committee reporting the 1984 cable bill acknowledged that, in general, market demand would prompt cable operators to provide diverse programming. It recognized, though, the incentives cable operators might have to exclude "programming which represents a social or political view point that a cable operator does not wish to disseminate, or ... competes with a program service already being provided by that cable system." H.R.Rep. No. 98-934, at 48, U.S.Code Cong. & Admin.News 1984, p. 4685. In its view, the leased access provisions were narrowly drawn structural regulations of private industry, cf. Associated Press v. United States, 326 U.S. 1, 65 S.Ct. 1416. 89 L.Ed. 2013 (1945), to enhance the free flow and diversity of information available to the public without governmental intrusion into decisions about program content. H.R.Rep. No. 98-934, supra. at 32-35. The functional equivalence of designating a public forum and mandating common carriage suggests the same scrutiny should be applied to attempts in either setting to impose content discrimination by law. Under our precedents, the scrutiny is strict.

"The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. Widmar v. Vincent. 454 U.S. 263. 102 S.Ct. 269. 70 L.Ed.2d 440 (1981) (university meeting facilities); City of Madison Joint School District v. Wisconsin Employment Relations Comm'n. 429 U.S. 167. 97 S.Ct. 421, 50 L.Ed.2d 376 (1976) (school board meeting); *799Southeastern Promotions, Ltd. v. Conrad. 420 U.S. 546. 95 S.Ct. 1239. 43 L.Ed.2d 448 (1975) (municipal theater). Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply

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in a traditional public forum. Reasonable time, place, and manner regulations**2413 are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." *Perry*, 460 U.S., at 45-46, 103 S.Ct., at 955 (footnote omitted).

In Police Dept. of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972), we made clear that selective exclusions from a public forum were unconstitutional. Invoking the First and Fourteenth Amendments to strike down a city ordinance allowing only labor picketing on any public way near schools, we held the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." Id., at 96, 92 S.Ct., at 2290.

"Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Ibid*.

Since the same standard applies to exclusions from limited or unlimited designated public fora as from traditional forums, <u>Lee. 505 U.S.</u>, at 678, 112 S.Ct., at 2705, there is no reason the kind of selective exclusion we condemned in <u>Mosley</u> should be tolerated here.

The plurality acknowledges content-based exclusions from the right to use a common carrier could violate the First Amendment. It tells us, however, that it is wary of analogies to doctrines developed elsewhere, and so does not address this issue. Ante, at 2388. This newfound aversion to analogical reasoning strikes at a process basic to legal analysis. *800 See E. Levi, An Introduction to Legal Reasoning 1-2 (1949). I am not suggesting the plurality should look far afield to other areas of law; these are settled First Amendment doctrines dealing with state action depriving certain speakers of protections afforded to all others.

In all events, the plurality's unwillingness to consider our public-forum precedents does not relieve it of the burden of explaining why strict scrutiny should not apply. Except in instances involving well-settled

categories of proscribable speech, see RAV, 505 U.S. at 382-390. 112 S.Ct. at 2542-2547. strict scrutiny is the baseline rule for reviewing any contentbased discrimination against speech. The purpose of forum analysis is to determine whether, because of the property or medium where speech takes place, there should be any dispensation from this rule. See Consolidated Edison Co. of N.Y. v. Public Service Comm'n of N.Y., 447 U.S. 530, 538-539, 100 S.Ct. 2326. 2333-2334. 65 L.Ed.2d 319 (1980). In the context of government property, we have recognized an exception "[w]here the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license," and in those circumstances, we have said, regulations of speech need only be reasonable and viewpoint neutral. Lee, supra, at 678-679, 112 S.Ct., at 2705-2706. Here, of course, the Government has not dedicated the cable operator's property for leased access to serve some proprietary function of its own; it has done so to provide a forum for a vital class of programmers who otherwise would be excluded from cable television.

The question remains whether a dispensation from strict scrutiny might be appropriate because § 10(a) restores in part an editorial discretion once exercised by the cable operator over speech occurring on its property. This is where public-forum doctrine gives guidance. Common-carrier requirements of leased access are little different in function from designated public fora, and no different standard of review should apply. It is not that the functional equivalence of leased access channels to designated public fora *801 compels strict scrutiny; rather, it simply militates against recognizing an exception to the normal rule.

Perhaps, as the plurality suggests, ante, at 2388-2389, \$10(a) should be treated as a limitation on a forum rather than an exclusion from it. This would not change the analysis, however. If Government has a freer hand to draw content-based distinctions in limiting a forum than in excluding someone from it, the First Amendment would be a dead letter in designated public fora; every **2414 exclusion could be recast as a limitation. See Post. Between Governance and Management: the History and Theory of the Public Forum, 34 UCLA L.Rev. 1713, 1753 (1987). We have allowed content-based limitations of public fora, but only when necessary to serve specific institu-

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tional ends. See Perry. 460 U.S., at 48, 103 S.Ct., at 956-957 (school mailboxes, if considered designated public fora, could be limited to mailings from "organizations that engage in activities of interest and educational relevance to students"); Widmar v. Vincent. 454 U.S. 263. 267-268. n. 5. 102 S.Ct. 269, 273, n. 5. 70 L.Ed.2d 440 (1981) (recognizing a public university could limit the use of its facilities by reasonable regulations compatible with its mission of education); Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175, n. 8, 97 S.Ct. 421, 426, n. 8, 50 L.Ed.2d 376 (1976) (in assessing a teacher's right to speak at a school board meeting, considering it obvious that "public bodies may confine their meetings to specified subject matter"). The power to limit or redefine fora for a specific legitimate purpose, see Rosenberger, 515 U.S., at 829-830, 115 S.Ct., at 2516-2517, does not allow the government to exclude certain speech or speakers from them for any reason at all.

Madison Joint School Dist., supra. illustrates the point. The Wisconsin Employment Relations Commission had ordered a school board to prohibit school employees other than union representatives from speaking at its meetings on matters subject to collective bargaining between the board and the union. Id. at 173, 97 S.Ct., at 425. While recognizing the power of a State to limit school board meetings to certain subject matter, *802 we held it could not confine the forum "to one category of interested individuals." Id., at 175, 97 S.Ct., at 426. The exclusion would skew the debate and deprive decisionmakers of the benefit of other voices. Id., at 175-176, 97 S.Ct., at 426-427.

It is no answer to say Congress does not have to create access channels at all, so it may limit access as it pleases. Whether or not a government has any obligation to make railroads common carriers, under the Equal Protection Clause it could not define common carriage in ways that discriminate against suspect classes. See Bailev v. Patterson. 369 U.S. 31, 33, 82 S.Ct. 549. 550-551. 7 L.Ed.2d 512 (1962)(per curiam) (States may not require railroads to segregate the races). For the same reason, even if Congress has no obligation to impose common-carriage rules on cable operators or retain them forever, it is not at liberty to exclude certain forms of speech from their protection on the suspect basis of content. See Perry. supra, at 45-46, 103 S.Ct., at 954-956.

I do not foreclose the possibility that the Government could create a forum limited to certain topics or to serving the special needs of certain speakers or audiences without its actions being subject to strict scrutiny. This possibility seems to trouble the plurality. which wonders if a local government must "show a compelling state interest if it builds a band shell in the park and dedicates it solely to classical music (but not to jazz)." Ante, at 2389. This is not the correct analogy. These cases are more akin to the Government's creation of a band shell in which all types of music might be performed except for rap music. The provisions here are content-based discriminations in the strong sense of suppressing a certain form of expression that the Government dislikes or otherwise wishes to exclude on account of its effects, and there is no justification for anything but strict scrutiny here.

Giving government free rein to exclude speech it dislikes by delimiting public fora (or commoncarriage provisions) would have pernicious effects in the modern age. Minds are *803 not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media, Cf. United States v. Kokinda, 497 U.S. 720. 737, 110 S.Ct. 3115, 3125, 111 L.Ed.2d 571 (1990) (KENNEDY, J., concurring in judgment). The extent of public entitlement to participate in those means of communication may be changed as technologies change; and in expanding those entitlements the Government has no greater right to discriminate on suspect grounds than it does when it effects a ban on speech against the backdrop of the entitlements to **2415 which we have been more accustomed. It contravenes the First Amendment to give Government a general license to single out some categories of speech for lesser protection so long as it stops short of viewpoint discrimination.

D

The Government advances a different argument for not applying strict scrutiny in these cases. The nature of access channels to one side, it argues the nature of the speech in question-indecent broadcast (or cablecast)-is subject to the lower standard of review it contends was applied in FCC v. Pacifica Foundation. 438 U.S. 726, 748, 98 S.Ct. 3026, 3039-3040, 57 L.Ed.2d 1073 (1978) (upholding an FCC order de-

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claring the radio broadcast of indecent speech during daytime hours to be sanctionable).

Pacifica did not purport, however, to apply a special standard for indecent broadcasting. Emphasizing the narrowness of its holding, the Court in Pacifica conducted a context-specific analysis of the FCC's restriction on indecent programming during daytime hours. See id., at 750, 98 S.Ct., at 3040-3041. See also Sable Communications, 492 U.S., at 127-128. 109 S.Ct. at 2837-2838 (underscoring the narrowness of Pacifica). It relied on the general rule that "broadcasting ... has received the most limited First Amendment protection." 438 U.S., at 748, 98 S.Ct., at 3040. We already have rejected the application of this lower broadcast standard of review to infringements on the liberties of cable operators, even though they control an important communications*804 medium, Turner Broadcasting, 512 U.S., at 637-641. 114 S.Ct., at 2456-2458. There is even less cause for a lower standard here.

Pacifica did identify two important considerations relevant to the broadcast of objectionable material. First, indecent broadcasting "confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." 438 U.S., at 748, 98 S.Ct., at 3040. Second, "broadcasting is uniquely accessible to children, even those too young to read." Id., at 749, 98 S.Ct., at 3040. Pacifica teaches that access channels, even if analogous to ordinary public fora from the standpoint of the programmer, must also be considered from the standpoint of the viewer. An access channel is not a forum confined to a discrete public space; it can bring indecent expression into the home of every cable subscriber, where children spend astounding amounts of time watching television, cf. ante, at 2386 (citing studies). Though in Cohen we explained that people in public areas may have to avert their eyes from messages that offend them, 403 U.S., at 21, 91 S.Ct.. at 1786, we further acknowledged that "government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue," ibid. See Hess v. Indiana. 414 U.S. 105, 108, 94 S.Ct. 326, 328-329, 38 L.Ed.2d 303 (1973)(per curiam), Rowan v. Post Office Dept., 397 U.S. 728. 736-738, 90 S.Ct. 1484, 1490-1491, 25 L.Ed.2d 736 (1970). This is more true when the interests of children are at stake. See <u>id.</u> at 738, 90 S.Ct., at 1491 ("[T]he householder [should not] have to risk that offensive material come into the hands of his children before it can be stopped").

These concerns are weighty and will be relevant to whether the law passes strict scrutiny. They do not justify, however, a blanket rule of lesser protection for indecent speech. Other than the few categories of expression that can be proscribed, see R.A.V., 505 U.S., at 382-390, 112 S.Ct., at 2542-2547, we have been reluctant to mark off new categories of speech for diminished constitutional protection. Our hesitancy reflects *805 skepticism about the possibility of courts' drawing principled distinctions to use in judging governmental restrictions on speech and ideas, Cohen, 403 U.S., at 25, 91 S.Ct., at 1788, a concern heightened here by the inextricability of indecency from expression "[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." Id., at 26. 91 S.Ct., at 1788. The same is true of forbidding programs indecent in some respect. In artistic or political settings, indecency**2416 may have strong communicative content, protesting conventional norms or giving an edge to a work by conveying "otherwise inexpressible emotions." Ibid. In scientific programs, the more graphic the depiction (even if to the point of offensiveness), the more accurate and comprehensive the portrayal of the truth may be. Indecency often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power. Under our traditional First Amendment jurisprudence, factors perhaps justifying some restriction on indecent cable programming may all be taken into account without derogating this category of protected speech as marginal.

IV

At a minimum, the proper standard for reviewing $\S\S$ 10(a) and (c) is strict scrutiny. The plurality gives no reason why it should be otherwise. I would hold these enactments unconstitutional because they are not narrowly tailored to serve a compelling interest.

The Government has no compelling interest in restoring a cable operator's First Amendment right of editorial discretion. As to § 10(c), Congress has no interest at all, since under most franchises operators had no

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rights of editorial discretion over PEG access channels in the first place. As to § 10(a), any governmental interest in restoring operator discretion over indecent programming on leased access channels is too minimal to justify the law. First, the transmission of indecent programming over leased access channels *806 is not forced speech of the operator. Turner Broadcasting, supra, at 655-656, 114 S.Ct., at 2456-2466: PruneYard, 447 U.S., at 87, 100 S.Ct., at 2044. Second, the discretion conferred by the law is slight. The operator is not authorized to place programs of its own liking on the leased access channels, nor to remove other speech (racist or violent, for example) that might be offensive to it or to viewers. The operator is just given a veto over the one kind of lawful speech Congress disdains.

Congress does have, however, a compelling interest in protecting children from indecent speech. Sable Communications, 492 U.S., at 126, 109 S.Ct., at 2836-2837; Ginsberg v. New York, 390 U.S., 629, 639-640, 88 S.Ct. 1274, 1280-1281, 20 L.Ed.2d 195 (1968). See also Pacifica, 438 U.S., at 749-750, 98 S.Ct., at 3040-3041 (same). So long as society gives proper respect to parental choices, it may, under an appropriate standard, intervene to spare children exposure to material not suitable for minors. This interest is substantial enough to justify some regulation of indecent speech even under. I will assume, the indecency standard used here.

Sections 10(a) and (c) nonetheless are not narrowly tailored to protect children from indecent programs on access channels. First, to the extent some operators may allow indecent programming, children in localities those operators serve will be left unprotected. Partial service of a compelling interest is not narrow tailoring. FCC v. League of Women Voters of Cal., 468 U.S. 364, 396, 104 S.Ct. 3106, 3125-3126, 82 L.Ed.2d 278 (1984) (asserted interest in keeping noncommercial stations free from controversial or partisan opinions not served by ban on station editorials, if such opinions could be aired through other programming); Florida Star v. B.J.F., 491 U.S. 524, 540-541, 109 S.Ct. 2603, 2612-2613, 105 L.Ed.2d 443 (1989) (selective ban on publication of rape victim's name in some media but not others not narrowly tailored). Cf. Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 73, 103 S.Ct. 2875, 2884, 77 L.Ed.2d 469 (1983) (restriction that "provides only the most limited incremental support for the interest asserted"

cannot pass muster under commercial-speech standards). Put another way, the *807 interest in protecting children from indecency only at the caprice of the cable operator is not compelling. Perhaps Congress drafted the law this way to avoid the clear constitutional difficulties of banning indecent speech from access channels, but the First Amendment does not permit this sort of ill fit between a law restricting speech and the interest it is said to serve.

Second, to the extent cable operators prohibit indecent programming on access channels, not only children but adults will be deprived of it. The Government may not **2417 "reduce the adult population ... to [viewing] only what is fit for children." Butler v. Michigan, 352 U.S. 380, 383, 77 S.Ct. 524, 526, 1 L.Ed.2d 412 (1957). It matters not that indecent programming might be available on the operator's other channels. The Government has no legitimate interest in making access channels pristine. A block-andsegregate requirement similar to § 10(b), but without its constitutional infirmity of requiring persons to place themselves on a list to receive programming, see ante, at 2392, protects children with far less intrusion on the liberties of programmers and adult viewers than allowing cable operators to ban indecent programming from access channels altogether. When applying strict scrutiny, we will not assume plausible alternatives will fail to protect compelling interests; there must be some basis in the record, in legislative findings or otherwise, establishing the law enacted as the least restrictive means. Sable Communications, supra, at 128-130, 109 S.Ct., at 2837-2839. Cf. Turner Broadcasting, 512 U.S., at 664-668, 114 S.Ct.. at 2470-2472. There is none here.

Sections 10(a) and (c) present a classic case of discrimination against speech based on its content. There are legitimate reasons why the Government might wish to regulate or even restrict the speech at issue here, but §§ 10(a) and (c) are not drawn to address those reasons with the precision the First Amendment requires.

*808 V

Not only does the plurality fail to apply strict scrutiny, but its reasoning is unpersuasive on its own terms.

The plurality declares § 10(c) unconstitutional be-

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cause it interferes with local supervisory systems that "can set programming policy and approve or disapprove particular programming services." Ante, at 2395. Replacing these local schemes with a cable operator veto would, in the plurality's view, "greatly increase the risk that certain categories of programming (say, borderline offensive programs) will not appear,"ante, at 2397. Although the plurality terms these local schemes "public/nonprofit programming control systems," ante, at 2395, it does not contend (nor does the record suggest) that any local board or access center has the authority to exclude indecent programming, or to do anything that would cast doubt on the status of public access channels as public fora Cf. Agosta 88 (New York state law forbids editorial control over public access programs by either the cable operator or the municipality); Comments of Hillsborough County Board of County Commissioners 2, FCC Record (explaining county's inability to exclude indecent programming). Indeed, "[m]ost access centers surveyed do not prescreen at all, except, as in [two named localities], a high speed run-through for technical quality." P. Aufderheide, Public Access Cable Programming, Controversial Speech, and Free Expression (1992), reprinted in App. 61, 68. As the plurality acknowledges, the record indicates no response to indecent programming by local access centers (whether they prescreen or not) other than "requiring indemnification by programmers, certification of compliance with local standards, time segregation, [and] adult content advisories," ante, at 2395. Those are measures that, if challenged, would likely survive strict scrutiny as narrowly tailored to safeguard children. If those measures, in the words of the plurality, "normally avoid, minimize, or eliminate any child-related *809 problems concerning 'patently offensive' programming" on public access channels, ante, at 2396, one is left to wonder why the cable operator veto over leased access programming authorized in § 10(a) is constitutional even under the plurality's First Amendment analysis. Although I concur in its judgment that § 10(c) is invalid, I cannot agree with the plurality's reasoning.

In regard to § 10(a), the plurality's analysis there undermines its claims of faithfulness to our First Amendment jurisprudence and close attention to context.

First, the plurality places some weight on there being

"nothing to stop 'adults who feel the need' from finding [indecent] programming elsewhere, say, on tape or in theaters," or on competitive services like direct broadcast television, ante, at 2387. The availability**2418 of alternative channels of communication may be relevant when we are assessing content-neutral time, place, and manner restrictions, Ward v. Rock Against Racism. 491 U.S. 781, 791, 802, 109 S.Ct. 2746, 2753-2754, 2759-2760, 105 L.Ed.2d 661 (1989), but the fact that speech can occur elsewhere cannot justify a content-based restriction, Southeastern Promotions, 420 U.S., at 556, 95 S.Ct., at 1245; Schneider v. State (Town of Irvington), 308 U.S. 147, 163, 60 S.Ct. 146, 151-152, 84 L.Ed. 155 (1939).

Second, the plurality suggests the permissive nature of § 10(a) at least does not create the same risk of exclusion as a total ban on indecency. Ante, at 2387. This states the obvious, but the possibility the Government could have imposed more draconian limitations on speech never has justified a lesser abridgment. Indeed, such an argument almost always is available; few of our First Amendment cases involve outright bans on speech. See, e.g., Forsyth County v. Nationalist Movement, 505 U.S. 123, 130-137, 112 S.Ct. 2395, 2401-2405, 120 L.Ed.2d 101 (1992) (broad discretion of county administrator to award parade permits and to adjust permit fee according to content of speech violates First Amendment); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963) (informal threats to recommend criminal prosecutions and other pressure tactics by state morality*810 commission against book publishers violate the First Amendment).

Third, based on its own factual speculations, the plurality discounts the risks created by the law that operators will not run indecent programming on access channels. The plurality takes "a glance at the programming that cable operators allow on their own (nonaccess) channels," and, espying some indecent programming there, supposes some cable operators may be willing to allow similar programs on leased access channels. *Ante*, at 2387. This sort of surmise, giving the government the benefit of the doubt when it restricts speech, is an unusual approach to the First Amendment, to put it mildly. Worse, it ignores evidence of industry structure that should cast doubt on the plurality's sanguine view of the probable fate of programming considered "indecent" under § 10(a).

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The plurality fails to note that, aside from the indecency provisions of § 10 tacked on in a Senate floor amendment, the 1992 Act strengthened the regulation of leased access channels because it was feared cable operators would exercise their substantial market power to exclude disfavored programmers. The congressional findings in the statute and the conclusions of the Senate Committee on Commerce, Science, and Transportation after more than two years of hearings on the cable market, see S.Rep. No. 102-92, pp. 3-4 (1991), U.S.Code Cong. & Admin.News 1992, pp. 1133, 1135-36, are instructive. Leased access channels had been underused since their inception in 1984, the Senate Committee determined. Id., at 30. Though it recognized the adverse economics of leased access for programmers may have been one reason for the underutilization, the Committee found the obstinacy of cable operators and their control over prices, terms, and conditions also were to blame. Id., at 31.

"The cable operator is almost certain to have interests that clash with that of the programmer seeking to use leased access channels. If their interests were similar, the operator would have been more than willing to carry *811 the programmer on regular cable channels. The operator thus has already decided for any number of reasons not to carry the programmer. For example, the operator may believe that the programmer might compete with programming that the [operator] owns or controls. To permit the operator to establish the leased access rate thus makes little sense." Ibid.

Perhaps some operators will choose to show the indecent programming they now may banish if they can command a better price than other access programmers are willing to pay. In the main, however, leased access programs are the ones the cable operator, for competitive reasons or otherwise, has no interest in showing. And because the cable operator may put to his own commercial use any leased access capacity not taken by unaffiliated programmers, 47 U.S.C. § 532(b)(4), operators have little incentive to allow indecent**2419 programming if they have excess capacity on leased access channels.

There is even less reason to think cable operators will choose to show indecent programs on public access channels. The operator is not paid, or paid much, for transmitting programs on these channels; public ac-

cess programs may compete with the operator's own programs; the operator will wish to avoid unwanted controversy; and here, as with leased access channels, the operator may reclaim unused PEG capacity for its own paid use, 47 U.S.C. § 531(d)(1).

In the 1992 Act, Congress recognized cable operators might want to exclude unaffiliated or otherwise disfavored programmers from their channels, but it granted operators discretion to do so in regard to but a single category of speech. The obvious consequence invited by the discretion is exclusion. I am not sure why the plurality would suppose otherwise, or contend the practical consequences of § 10(a) would be no worse for programmers than those flowing from the sort of time-segregation requirement approved in Pacifica. See ante, at 2387. Despite its claim of making *812 "a more contextual assessment" of these cases, ante, at 2388, the plurality ignores a key difference of these cases from Pacifica. There, the broadcaster wanted to air the speech in question; here, the cable operator does not. So the safe harbor of late-night programming permitted by the FCC in Pacifica would likely promote speech, whereas suppression will follow from § 10(a).

V

In agreement with the plurality's analysis of § 10(b) of the Act, insofar as it applies strict scrutiny, I join Part III of its opinion. Its position there, however, cannot be reconciled with upholding § 10(a). In the plurality's view, § 10(b), which standing alone would guarantee an indecent programmer some access to a cable audience, violates the First Amendment, but § 10(a), which authorizes exclusion of indecent programming from access channels altogether, does not. There is little to commend this logic or result. I dissent from the judgment of the Court insofar as it upholds the constitutionality of § 10(a).

Justice <u>THOMAS</u>, joined by THE CHIEF JUSTICE and Justice <u>SCALIA</u>, concurring in the judgment in

part and dissenting in part.

I agree with the principal opinion's conclusion that \S 10(a) is constitutionally permissible, but I disagree with its conclusion that $\S\S 10(b)$ and (c) violate the First Amendment. For many years, we have failed to articulate how, and to what extent, the First Amendment protects cable operators, programmers, and viewers from state and federal regulation. I think it is time we did so, and I cannot go along with Justice

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BREYER's assiduous attempts to avoid addressing that issue openly.

1

The text of the First Amendment makes no distinctions among print, broadcast, and cable media, but we have done so. In *813Red Lion Broadcasting Co. v. FCC. 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 1969), we held that, in light of the scarcity of broadcasting frequencies, the Government may require a broadcast licensee "to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." Id., at 389. 89 S.Ct., at 1806. We thus endowed the public with a right of access "to social, political, esthetic, moral, and other ideas and experiences." Id., at 390, 89 S.Ct., at 1807. That public right left broadcasters with substantial, but not complete, First Amendment protection of their editorial discretion. See, e. g., Columbia Broadcasting System. Inc. v. Democratic National Committee, 412 U.S. 94. 117-118. 93 S.Ct. 2080. 2094. 36 L.Ed.2d 772 (1973) ("A broadcast licensee has a large measure of journalistic freedom but not as large as that exercised by a newspaper").

In contrast, we have not permitted that level of government interference in the context of the print media In Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241. 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), for instance,**2420 we invalidated a Florida statute that required newspapers to allow, free of charge, a right of reply to political candidates whose personal or professional character the paper assailed. We rejected the claim that the statute was constitutional because it fostered speech rather than restricted it, as well as a related claim that the newspaper could permissibly be made to serve as a public forum. 1d., at 256-258. 94 S.Ct., at 2838-2840. We also flatly rejected the argument that the newspaper's alleged media monopoly could justify forcing the paper to speak in contravention of its own editorial discretion. Id., at 256, 94 S.Ct., at 2838-2839.

Our First Amendment distinctions between media, dubious from their infancy, FNI placed cable in a doctrinal wasteland in which regulators and cable operators alike could not be sure whether cable was enti-

tled to the substantial First Amendment protections afforded the print media or was *814 subject to the more onerous obligations shouldered by the broadcast media. See Los Angeles v. Preferred Communications. Inc., 476 U.S. 488, 496, 106 S.Ct. 2034, 2039, 90 L.Ed.2d 480 (1986) (Blackmun, J., concurring) ("In assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis"). Over time, however, we have drawn closer to recognizing that cable operators should enjoy the same First Amendment rights as the nonbroadcast media.

FN1. See <u>Turner Broadcasting System. Inc.</u> v. FCC, 512 U.S. 622, 638, and n. 5. 114 S.Ct. 2445, 2457, and n. 5. 129 L.Ed.2d 497 (1994).

Our first ventures into the world of cable regulation involved no claims arising under the First Amendment, and we addressed only the regulatory authority of the Federal Communications Commission (FCC) over cable operators. ^{FN2} Only in later cases did we begin to address the level of First Amendment protection applicable to cable operators. In Preferred Communications, for instance, when a cable operator challenged the city of Los Angeles' auction process for a single cable franchise, we held that the cable operator had stated a First Amendment claim upon which relief could be granted. Id., at 493, 106 S.Ct., at 2037. We noted that cable operators communicate various topics "through original programming or by exercising editorial discretion over which stations or programs to include in [their] repertoire." Id., at 494. 106 S.Ct., at 2037. Cf. FCC v. Midwest Video Corp., 440 U.S. 689, 707, 99 S.Ct. 1435, 1445, 59 L.Ed.2d 692 (1979)(Midwest Video II) ("Cable operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include"). But we then likened*815 the operators' First Amendment interests to those of broadcasters subject to Red Lion's right of access requirement. 476 U.S., at 494-495, 106 S.Ct., at 2037-2038.

FN2, See <u>United States v. Southwestern Cable Co.</u>. 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968); <u>United States v. Midwest Video Corp.</u>, 406 U.S. 649, 92 S.Ct.

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1860. 32 L.Ed.2d 390 (1972) (Midwest Video I). Our decisions in Southwestern Cable and Midwest Video I were purely regulatory and gave no indication whether, or to what extent, cable operators were protected by the First Amendment.

Five years later, in Leathers v. Medlock, 499 U.S. 439, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991), we dropped any reference to the relaxed scrutiny permitted by Red Lion. Arkansas had subjected cable operators to the State's general sales tax, while continuing to exempt newspapers, magazines, and scrambled satellite broadcast television. Cable operators, among others, challenged the tax on First Amendment grounds, arguing that the State could not discriminatorily apply the tax to some, but not all, members of the press. Though we ultimately upheld the tax scheme because it was not content based, we agreed with the operators that they enjoyed the protection of the First Amendment. We found that cable operators engage in speech by providing news, information, and entertainment to their subscribers and that they are "part of the 'press.' " 499 U.S., at 444, 111 S.Ct., at 1442.

**2421 Two Terms ago, in Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994), we stated expressly what we had implied in Leathers. The Red Lion standard does not apply to cable television. 512 U.S., at 637, 114 S.Ct., at 2456 ("[T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation ... does not apply in the context of cable regulation"); id., at 639, 114 S.Ct., at 2457 ("[A]pplication of the more relaxed standard of scrutiny adopted in Red Lion and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation"). While Members of the Court disagreed about whether the must-carry rules imposed by Congress were content based, and therefore subject to strict scrutiny, there was agreement that cable operators are generally entitled to much the same First Amendment protection as the print media. But see id., at 670, 114 S.Ct., at 2473 (STEVENS, J., concurring in part and concurring in judgment) ("Cable operators' control of essential facilities provides a *816 basis for intrusive regulation that would be inappropriate and perhaps impermissible for other communicative media").

In Turner, by adopting much of the print paradigm, and by rejecting Red Lion, we adopted with it a considerable body of precedent that governs the respective First Amendment rights of competing speakers. In Red Lion, we had legitimized consideration of the public interest and emphasized the rights of viewers, at least in the abstract. Under that view, "filt is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." 395 U.S., at 390, 89 S.Ct., at 1806. After Turner, however, that view can no longer be given any credence in the cable context. It is the operator's right that is preeminent. If Tornillo and Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986), are applicable, and I think they are, see Turner, supra, at 681-682, 114 S.Ct., at 2478-2479 (O'CONNOR, J., concurring in part and dissenting in part), then, when there is a conflict, a programmer's asserted right to transmit over an operator's cable system must give way to the operator's editorial discretion. Drawing an analogy to the print media, for example, the author of a book is protected in writing the book, but has no right to have the book sold in a particular bookstore without the store owner's consent. Nor can government force the editor of a collection of essays to print other essays on the same subject.

The Court in *Turner* found that the FCC's must-carry rules implicated the First Amendment rights of both cable operators and cable programmers. The rules interfered with the operators' editorial discretion by forcing them to carry broadcast programming that they might not otherwise carry, and they interfered with the programmers' ability to compete for space on the operators' channels. 512 U.S., at 636-637, 114 S.Ct., at 2455-2456; id., at 675-676, 114 S.Ct., at 2475-2476 (O'CONNOR, J., concurring in part and dissenting in part). We implicitly recognized in Turner that the programmer's right to compete for channel space *817 is derivative of, and subordinate to, the operator's editorial discretion. Like a freelance writer seeking a paper in which to publish newspaper editorials, a programmer is protected in searching for an outlet for cable programming, but has no freestanding First Amendment right to have that programming transmitted. Cf. Miami Herald Publishing Co. v. Tornillo, 418 U.S., at 256-258, 94 S.Ct., at 2038-2840. Likewise, the rights of would-be viewers are derivative of the speech rights of operators and programmers. Cf. Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748.

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756-757, 96 S.Ct. 1817, 1823, 48 L.Ed.2d 346 (1976) ("Freedom of speech presupposes a willing speaker. But where a speaker exists, ... the protection afforded is to the communication, to its source and to its recipients both"). Viewers have a general right to see what a willing operator transmits, but, under *Tornillo* and *Pacific Gas*, they certainly have no right to force an unwilling operator to speak.

By recognizing the general primacy of the cable operator's editorial rights over the rights of programmers and viewers, Turner raises serious questions about the merits of petitioners' claims. None of the petitioners **2422 in these cases are cable operators; they are all cable viewers or access programmers or their representative organizations. See Brief for Petitioners in No. 95-124, pp. 5-6; Brief for Petitioners New York Citizens Committee for Responsible Media et al. in No. 95-227, p. 3; Brief for Petitioners Alliance for Community Media et al. in No. 95-227, p. 3. It is not intuitively obvious that the First Amendment protects the interests petitioners assert, and neither petitioners nor the plurality have adequately explained the source or justification of those asserted rights.

Justice BREYER's detailed explanation of why he believes it is "unwise and unnecessary," ante, at 2385, to choose a standard against which to measure petitioners' First Amendment claims largely disregards our recent attempt in <u>Turner</u> *818 to define that standard. First His attempt to distinguish <u>Turner</u> on the ground that it did not involve "the effects of television viewing on children," ante, at 2388, is meaningless because that factual distinction has no bearing on the existence and ordering of the free speech rights asserted in these cases.

FN3. Curiously, the plurality relies on "changes taking place in the law, the technology, and the industrial structure related to telecommunications," ante, at 2385, to justify its avoidance of traditional First Amendment standards. If anything, as the plurality recognizes, ante, at 2387, those recent developments-which include the growth of satellite broadcast programming and the coming influx of video dialtone services-suggest that local cable operators have little or no monopoly power and create no programming bottleneck problems, thus effec-

tively negating the primary justifications for treating cable operators differently from other First Amendment speakers.

In the process of deciding not to decide on a governing standard, Justice BREYER purports to discover in our cases an expansive, general principle permitting government to "directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech." Ante, at 2385. This heretofore unknown standard is facially subjective and openly invites balancing of asserted speech interests to a degree not ordinarily permitted. It is true that the standard I endorse lacks the "flexibility" inherent in the plurality's balancing approach, ante, at 2384, but that relative rigidity is required by our precedents and is not of my own making.

In any event, even if the plurality's balancing test were an appropriate standard, it could only be applied to protect speech interests that, under the circumstances, are themselves protected by the First Amendment But, by shifting the focus to the balancing of "complex" interests, ante, at 2386, Justice BREYER never explains whether (and if so, how) a programmer's ordinarily unprotected interest in affirmative transmission of its programming acquires constitutional significance on leased and public access channels. See *819 ante, at 2385 ("interests of programmers in maintaining access channels"); ibid. ("interests served by the access requirements"). It is that question, left unanswered by the plurality, to which I now turn.

II

A

In 1984, Congress enacted 47 U.S.C. § 532(b), which generally requires cable operators to reserve approximately 10 to 15 percent of their available channels for commercial lease to "unaffiliated persons." Operators were prohibited from "exercis[ing] any editorial control" over these leased access channels. § 532(c)(2). In 1992, Congress withdrew part of its prohibition on the exercise of the cable operators' editorial control and essentially permitted operators to censor privately programming that the "operator reasonably believes describes or depicts sexual or excretory activities or organs in a

518 U.S. 727, 116 S.Ct. 2374, 135 L.Ed.2d 888, 64 USLW 4706, 96 Cal. Daily Op. Serv. 4792, 96 Daily Journal D.A.R. 7697, 3 Communications Reg. (P&F) 545 (Cite as: 518 U.S. 727, 116 S.Ct. 2374)

excretory activities or organs in a patently offensive manner." § 532(h).

Since 1984, federal law has also permitted local franchise authorities to require cable operators to set aside certain channels for "public, educational, or governmental use" (PEG channels), FN1 § 531(a), but unlike the **2423 leased access provisions, has not directly required operators to do so. As with leased access, Congress generally prohibited cable operators from exercising "any editorial control" over public access channels, but provided that operators could prohibit the transmission of obscene programming § 531(e); see § 544(d). Section 10(c) of the 1992 Act broadened the operators' editorial control and instructed the FCC to promulgate regulations enabling a cable operator to ban from its public access channels "any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." Note following 47 U.S.C. § 531. The *820 FCC subsequently promulgated regulations in its Second Report and Order, In re Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992: Indecent Programming and Other Types of Materials on Cable Access Channels, 8 FCC Rcd 2638 (1993) (Second Report and Order). The FCC interpreted Congress' reference to "sexually explicit conduct" to mean that the programming must be indecent, and its regulations therefore permit cable operators to ban indecent programming from their public access channels. Id., at 2640.

> FN4. Because indecent programming on PEG channels appears primarily on public access channels, I will generally refer to PEG access as public access.

As I read these provisions, they provide leased and public access programmers with an expansive and federally enforced statutory right to transmit virtually any programming over access channels, limited only by the bounds of decency. It is no doubt true that once programmers have been given, rightly or wrongly, the ability to speak on access channels, the First Amendment continues to protect programmers from certain Government intrusions. Certainly, under our current jurisprudence, Congress could not impose a total ban on the transmission of indecent programming. See Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 127, 109 S.Ct. 2829, 2837, 106 L.Ed.2d 93 (1989) (striking down total ban on indecent dial-a-porn messages). At the same time, however, the Court has not recognized, as entitled to full constitutional protection, statutorily created speech rights that directly conflict with the constitutionally protected private speech rights of another person or entity FN5 We have not found a First Amendment violation in statutory schemes that substantially expand the speech opportunities of the person or entity challenging the scheme.

> FN5. Even in PruneYard Shopping Center v. Robins, 447 U.S. 74, 87-88, 100 S.Ct. 2035, 2044, 64 L.Ed.2d 741 (1980), for instance, we permitted California's compelled access rule only because it did not burden or conflict with the mall owner's own speech.

There is no getting around the fact that leased and public access are a type of forced speech. Though the constitutionality of leased and public access channels is not directly at *821 issue in these cases, FN6 the position adopted by the Court in Turner ineluctably leads to the conclusion that the federal access requirements are subject to some form of heightened scrutiny. See Turner, 512 U.S., at 661-662, 114 S.Ct., at 2469 (citing Ward v. Rock Against Racism. 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989); United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673. 20 L.Ed.2d 672 (1968)). Under that view, content-neutral governmental impositions on an operator's editorial discretion may be sustained only if they further an important governmental interest unrelated to the suppression of free speech and are no greater than is essential to further the asserted interest. See **2424id. at 377. 88 S.Ct., at 1679. Of course, the analysis I joined in Turner would have required strict scrutiny. 512 U.S., at 680-682, 114 S.Ct., at 2478-2479(O'CONNOR, J., concurring in part and dissenting in part).

> FN6. Following Turner. some commentators have questioned the constitutionality of leased and public access. See, e. g., J. Goodale, All About Cable § 6.04[5], pp. 6-38.6 to 6-38.7 (1996) ("In the wake of the Supreme Court's decision in the Turner Broadcasting case, the constitutionality of both PEG access and leased access requirements would seem open to searching reexamination.... To the extent that an access re-

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quirement ... is considered to be a contentbased restriction on the speech of a cable system operator, it seems clear, after Turner Broadcasting, that such a requirement would be found to violate the operator's First Amendment rights" (footnotes omitted)); Ugland, Cable Television, New Technologies and the First Amendment After Turner Broadcasting System. Inc. v. F.C. C., 60 Mo. L.Rev. 799, 837 (1995) ("PEG requirements are content-based on their face because they force cable system operators to carry certain types of programming" (emphasis in original)); Perritt, Access to the National Information Infrastructure, 30 Wake Forest L.Rev. 51. 66 (1995) (leased access and public access requirements "were called into question in Turner "). Moreover, as Justice O'CONNOR noted in Turner, Congress' imposition of common-carrierlike obligations on cable operators may raise Takings Clause questions, 512 U.S., at 684, 114 S.Ct., at 2480 (opinion concurring in part and dissenting in part). Such questions are not at issue here.

Petitioners must concede that cable access is not a constitutionally required entitlement and that the right they claim to leased and public access has, by definition, been governmentally created at the expense of cable operators' editorial *822 discretion. Just because the Court has apparently accepted, for now, the proposition that the Constitution permits some degree of forced speech in the cable context does not mean that the beneficiaries of a Government-imposed forced speech program enjoy additional First Amendment protections beyond those normally afforded to purely private speakers.

We have said that "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another," <u>Rosenberger v. Rector and Visitors of Univ. of Va.</u>, 515 U.S. 819, 828, 115 S.Ct. 2510, 2516, 132 L.Ed.2d 700 (1995), but this principle hardly supports petitioners' claims, for, if they do anything, the leased and public access requirements favor access programmers over cable operators. I do not see §§ 10(a) and (c) as independent restrictions on programmers, but as intricate parts of the leased and public access restrictions imposed by Congress (and state and local governments) on cable operators.

The question petitioners pose is whether §§ 10(a) and (c) are improper restrictions on their free speech rights, but *Turner* strongly suggests that the proper question is whether the leased and public access requirements (with §§ 10(a) and (c)) are improper restrictions on the *operators'* free speech rights. In my view, the constitutional presumption properly runs in favor of the operators' editorial discretion, and that discretion may not be burdened without a compelling reason for doing so. Petitioners' view that the constitutional presumption favors their asserted right to speak on access channels is directly contrary to *Turner* and our established precedents.

It is one thing to compel an operator to carry leased and public access speech, in apparent violation of *Tornillo*. but it is another thing altogether to say that the First Amendment forbids Congress to give back part of the operators' editorial discretion, which all recognize as fundamentally protected, in favor of a broader access right. It is no answer to say that leased and public access are content neutral and that *823 §§ 10(a) and (c) are not, for that does not change the fundamental fact, which petitioners never address, that it is the operators' journalistic freedom that is infringed, whether the challenged restrictions be content neutral or content based.

Because the access provisions are part of a scheme that restricts the free speech rights of cable operators and expands the speaking opportunities of access programmers, who have no underlying constitutional right to speak through the cable medium, I do not believe that access programmers can challenge the scheme, or a particular part of it, as an abridgment of their "freedom of speech." Outside the public forum doctrine, discussed *infra*, at 2426-2428, Government intervention that grants access programmers an opportunity to speak that they would not otherwise enjoy-and which does not directly limit programmers' underlying speech rights-cannot be an abridgement of the same programmers' First Amendment rights, even if the new speaking opportunity is content based.

The permissive nature of §§ 10(a) and (c) is important in this regard. If Congress had forbidden cable operators to carry indecent programming on leased and public access channels, that law would have burdened the programmer's right, recognized in *Turner*, supra. at 645, 114 S.Ct., at 2460-2461, to compete for space on an operator's system. The Court would

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undoubtedly strictly scrutinize such a law. See <u>Sable</u>, 492 U.S., at 126, 109 S.Ct., at 2836-2837, But §§ 10(a) and (c) do not burden a programmer's right to seek access for its indecent programming on an operator's system. Rather, they merely restore part of the editorial discretion an operator would have absent Government regulation without burdening the programmer's underlying speech rights. ENT

FN7. The plurality, in asserting that § 10(c) "does not restore to cable operators editorial rights that they once had," ante, at 2394, mistakes inability to exercise a right for absence of the right altogether. That cable operators "have not historically exercised editorial control" over public access channels, ibid, does not diminish the underlying right to do so, even if the operator's forbearance is viewed as a contractual quid pro quo for the local franchise.

**2425 *824 The First Amendment challenge, if one is to be made, must come from the party whose constitutionally protected freedom of speech has been burdened. Viewing the federal access requirements as a whole, it is the cable operator, not the access programmer, FNR whose speech rights have been infringed. Consequently, it is the operator, and not the programmer, whose speech has arguably been infringed by these provisions. If Congress passed a law forcing bookstores to sell all books published on the subject of congressional politics, we would undoubtedly entertain a claim by bookstores that this law violated the First Amendment principles established in Tornillo and Pacific Gas. But I doubt that we would similarly find merit in a claim by publishers of gardening books that the law violated their First Amendment rights. If that is so, then petitioners in these cases cannot reasonably assert that the Court should strictly scrutinize the provisions at issue in a way that maximizes their ability to speak over leased and public access channels and, by necessity, minimizes the operators' discretion.

FN8. Turner recognized that the must-carry rules burden programmers who must compete for space on fewer channels. 512 U.S., at 636-637, 114 S.Ct., at 2456. Leased access requirements may also similarly burden programmers who compete for space on nonaccess channels.

В

It makes no difference that the leased access restrictions may take the form of common carrier obligations. See Midwest Video II, 440 U.S., at 701, 99 S.Ct., at 1441-1442; see also Brief for Federal Respondents 23. But see 47 U.S.C. § 541(c) ("Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service"). That the leased access provisions may he described in common carrier terms does not demonstrate that access programmers *825 have obtained a First Amendment right to transmit programming over leased access channels. Labeling leased access a common carrier scheme has no real First Amendment consequences. It simply does not follow from common carrier status that cable operators may not, with Congress' blessing, decline to carry indecent speech on their leased access channels. Common carriers are private entities and may, consistent with the First Amendment, exercise editorial discretion in the absence of a specific statutory prohibition. Concurring in Sable. Justice SCALIA explained: "I note that while we hold the Constitution prevents Congress from banning indecent speech in this fashion, we do not hold that the Constitution requires public utilities to carry it." 492 U.S., at 133, 109 S.Ct., at 2840. See also Information Providers' Coalition for Defense of First Amendment v. FCC, 928 F.2d 866. 877 (C.A.9 1991) ("[A] carrier is free under the Constitution to terminate service to dial-a-porn operators altogether"); Carlin Communications, Inc. v. Mountain States Telephone & Telegraph Co., 827 F.2d 1291, 1297 (C.A.9 1987) (same), cert. denied, 485 U.S. 1029, 108 S.Ct. 1586, 99 L.Ed.2d 901 (1988); Carlin Communication, Inc. v. Southern Bell Telephone & Telegraph Co., 802 F.2d 1352, 1357 (C.A.11 1986) (same).

Nothing about common carrier status per se constitutionalizes the asserted interests of petitioners in these cases, and Justice KENNEDY provides no authority for his assertion that common carrier regulations "should be reviewed under the same standard as content-based restrictions on speech in a public forum." Ante, at 2412. Whether viewed as the creation of a common carrier scheme or simply as a regulatory restriction on cable operators' editorial discretion, the net effect is the same: operators' speech rights are restricted to make room for access programmers.

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Consequently, the fact that the leased access provisions impose a form of common carrier obligation on cable operators **2426 does not alter my view that Congress' leased access scheme burdens the constitutionally protected speech rights of cable operators in order *826 to expand the speaking opportunities of access programmers, but does not independently burden the First Amendment rights of programmers or

C

Petitioners argue that public access channels are public forums in which they have First Amendment rights to speak and that § 10(c) is invalid because it imposes content-based burdens on those rights. Brief for Petitioners New York Citizens Committee for Responsible Media et al. in No. 95-227, pp. 8-23; Brief for Petitioners Alliance for Community Media et al. in No. 95-227, pp. 32-35. Though I agree that content-based prohibitions in a public forum "must be narrowly drawn to effectuate a compelling state interest," Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 46, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983), I do not agree with petitioners' antecedent assertion that public access channels are public forums.

We have said that government may designate public property for use by the public as a place for expressive activity and that, so designated, that property becomes a public forum. Id., at 45, 103 S.Ct., at 954-955. Petitioners argue that "[a] local government does exactly that by requiring as a condition of franchise approval that the cable operator set aside a public access channel for the free use of the general public on a first-come, first-served, nondiscriminatory basis." FN9 *827 Brief for Petitioners Alliance for Community Media et al. in No. 95-227, p. 33. I disастее.

> FN9. In Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829-830, 115 S.Ct. 2510. 2516-2517. 132 L.Ed.2d 700 (1995), we found the university's student activity fund, a nontangible channel of communication, to be a limited public forum, but generally we have been quite reluctant to find even limited public forums in such channels of communication. Cornelius v. NAACP Legal Defense & Ed. Fund. Inc.,

473 U.S. 788, 804, 105 S.Ct. 3439, 3450, 87 L.Ed.2d 567 (1985) (Combined Federal Campaign not a limited public forum); Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37. 47-48, 103 S.Ct. 948, 956-957. 74 L.Ed.2d 794 (1983) (school mail facilities not a limited public forum). In any event, we certainly have never held that public access channels are a fully designated public forum that entitles programmers to freedom from content-based distinctions.

Cable systems are not public property. FN10 Cable systems are privately owned and privately managed, and petitioners point to no case in which we have held that government may designate private property as a public forum. The public forum doctrine is a rule governing claims of "a right of access to public property," Perry Ed. Assn., supra, at 44, 103 S.Ct., at 954, and has never been thought to extend beyond property generally understood to belong to the government. See International Soc. for Krishna Consciousness, Inc. v. Lee. 505 U.S. 672, 681, 112 S.Ct. 2701, 2707, 120 L,Ed,2d 541 (1992) (evidence of expressive activity at rail stations, bus stations, wharves, and Ellis Island was "irrelevant to public fora analysis, because sites such as bus and rail terminals traditionally have had private ownership" (emphasis in original)). See also id., at 678, 112 S.Ct., at 2705 (public forum is "government" or "public" property); Perry Ed. Assn., supra. at 45, 103 S.Ct., at 955 (designated public forum "consists of public property").

> FN10. See G. Shapiro, P. Kurland, & J. Mercurio, "CableSpeech": The Case for First Amendment Protection 119 (1983) ("Because cable systems are operated by private rather than governmental entities, cable television cannot be characterized as a public forum and, therefore, rights derived from the public forum doctrine cannot be asserted by those who wish to express themselves on cable systems").

Petitioners point to dictum in Cornelius v. NAACP Legal Defense & Ed. Fund. 473 U.S. 788, 801, 105 S.Ct. 3439, 3448, 87 L.Ed.2d 567 (1985), that a public forum may consist of "private property dedicated to public use," but that statement has no applicability here. That statement properly refers to the common practice of formally dedicating land for streets and

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parks when subdividing real estate for developments. See 1A C. Antieau & J. Antieau, Antieau's Local Government Law § 9.05 (1991); 11A E. McQuillin, Law of Municipal Corporations § 33.03 (3d ed.1991). Such dedications may or may not transfer title, but they at least create enforceable public easements in the dedicated land. 1A **2427 Antieau, supra, § 9.15; 11A McQuillin, supra, *828 § 33.68. To the extent that those easements create a property interest in the underlying land, it is that government-owned property interest that may be designated as a public forum.

It may be true, as petitioners argue, that title is not dispositive of the public forum analysis, but the nature of the regulatory restrictions placed on cable operators by local franchising authorities is not consistent with the kinds of governmental property interests we have said may be formally dedicated as public forums. Our public forum cases have involved property in which the government has held at least some formal easement or other property interest permitting the government to treat the property as its own in designating the property as a public forum. See, e.g., Hague v. Committee for Industrial Organization, 307 U.S. 496, 515, 59 S.Ct. 954, 963-964, 83 L.Ed. 1423 (1939) (streets and parks); Police Dept. of Chicago v. Moslev. 408 U.S. 92, 96, 92 S.Ct. 2286. 2290. 33 L.Ed.2d 212 (1972) (sidewalks adjoining public school); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555, 95 S.Ct. 1239, 1244-1245. 43 L.Ed.2d 448 (1975) (theater under longterm lease to city); Carev v. Brown, 447 U.S. 455. 460-462, 100 S.Ct. 2286, 2289-2291, 65 L.Ed.2d 263 (1980) (sidewalks in front of private residence); Widmar v. Vincent, 454 U.S. 263, 267-268, 102 S.Ct. 269. 273-274. 70 L.Ed.2d 440 (1981) (university facilities that had been opened for student activities). That is simply not true in these cases. Pursuant to federal and state law, franchising authorities require cable operators to create public access channels, but nothing in the record suggests that local franchising authorities take any formal easement or other property interest in those channels that would permit the government to designate that property as a public forum. FN11

FN11. Petitioners' argument that a property right called "the right to exclude" has been transferred to the government is not persuasive. Though it is generally true that, except-

ing § 10(c), cable operators are forbidden to exercise editorial discretion over public access channels, that prohibition is not absolute. Section 531(e) provides that the prohibition on the exercise of editorial discretion is subject to § 544(d)(1), which permits operators and franchising authorities to ban obscene or other constitutionally unprotected speech. Some States, however, have not permitted exercise of that authority. See, e.g., Minn. Stat. § 238,11 (1994) (prohibiting any censorship of leased or public access programming); N.Y. Pub. Serv. Law § 229 (McKinney Supp. 1996) (same). At any rate, the Court has never recognized a public forum based on a property interest "taken" by regulatory restriction.

*829 Similarly, assertion of government control over private property cannot justify designation of that property as a public forum. We have expressly stated that neither government ownership nor government control will guarantee public access to property. See Cornelius. supra, at 803, 105 S.Ct., at 3449-3450: Postal Service v. Council of Greenburgh Civic Assns., 453 U.S. 114, 129, 101 S.Ct., 2676, 2685, 69 L.Ed.2d 517 (1981). Government control over its own property or private property in which it has taken a cognizable property interest, like the theater in Southeastern Promotions. is consistent with designation of a public forum. But we have never even hinted that regulatory control, and particularly direct regulatory control over a private entity's First Amendment speech rights, could justify creation of a public forum. Properly construed, our cases have limited the government's ability to declare a public forum to property the government owns outright, or in which the government holds a significant property interest consistent with the communicative purpose of the forum to be designated.

Nor <u>am I</u> convinced that a formal transfer of a property interest in public access channels would suffice to permit a local franchising authority to designate those channels as a public forum. In no other public forum that we have recognized does a private entity, owner or not, have the obligation not only to permit another to speak, but to actually help produce and then transmit the message on that person's behalf. Cable operators regularly retain some level of managerial and operational control over their public access

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channels, subject only to the requirements of federal, state, and local law and the franchise agreement. In more traditional public forums, the government shoulders the burden of administering and enforcing the **2428 openness of the expressive forum, but it is frequently a private citizen, the operator, who shoulders that burden for public access channels. For instance, *830 it is often the operator who must accept and schedule an access programmer's request for time on a channel. FN12 And, in many places, the operator is actually obligated to provide production facilities and production assistance to persons seeking to produce access programming FN13 Moreover, unlike a park picketer, an access programmer cannot transmit its own message. Instead, it is the operator who must transmit, or "speak," the access programmer's message. That the speech may be considered the operator's is driven home by 47 U.S.C. § 559, which authorizes a fine of up to \$10,000 and two years' imprisonment for any person who "transmits over any cable system any matter which is obscene." See also *831 § 558 (making operators immune for all public access programming, except that which is obscene) FN14

FN12. See D. Brenner, M. Price, & M. Meyerson, Cable Television and Other Non-broadcast Video § 6.04[7] (1996) (hereinafter Brenner). Some States and local governments have formed nonprofit organizations to perform some of these functions. See D.C.Code Ann. § 43-1829(a) (1990 and Supp.1996) (establishing Public Access Corporation "for the purpose of facilitating and governing nondiscriminatory use" of public access channels).

FN13. See, e.g., 47 U.S.C. § 541(a)(4)(B) (authorizing franchise authorities to "require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support"); Conn.Gen.Stat. § 16-331c (1995) (requiring cable operators to contribute money or resources to cable advisory councils that monitor compliance with public access standards); § 16-333(c) (requiring the department of public utility control to adopt regulations "establishing minimum standards for the equipment supplied ... for the community access programming"); D.C.Code Ann. § 43-1829.1(c) (1990) ("For public access channel users, the franchisee shall provide use of the production facilities and production assistance at an amount set forth in the request for proposal"); Minn.Stat. § 238 084.3(b) (1994) (requiring cable operators to "make readily available for public use at least the minimal equipment necessary for the production of programming and playback of prerecorded programs"). That these activities are "partly financed with public funds," ante, at 2395, does not diminish the fact that these activities are also "partly financed" with the operator's money. See Brenner § 6.04[7], at 6-48 ("Frequently, access centers receive money and equipment from the cable operator"); id., § 6.04 [3][c], at 6-41 (discussing cable operator financing of public access channels and questioning its constitutionality as "forced subsidization of speech").

FN14. Petitioners argue that § 10(d) of the 1992 Act, 47 U.S.C. § 558, which lifts cable operators' immunity for obscene speech, forces or encourages operators to ban indecent speech. Because Congress could directly impose an outright ban on obscene programming, see Sable Communications of Cal. Inc. v. FCC. 492 U.S. 115, 124, 109 S.Ct. 2829, 2835-2836, 106 L.Ed.2d 93 (1989), petitioners' encouragement argument is meritless.

Thus, even were I inclined to view public access channels as public property, which I am not, the numerous additional obligations imposed on the cable operator in managing and operating the public access channels convince me that these channels share few, if any, of the basic characteristics of a public forum. As I have already indicated, public access requirements, in my view, are a regulatory restriction on the exercise of cable operators' editorial discretion, not a transfer of a sufficient property interest in the channels to support a designation of that property as a public forum. Public access channels are not public forums, and, therefore, petitioners' attempt to redistribute cable speech rights in their favor must fail. For this reason, and the other reasons articulated earlier, I would sustain both § 10(a) and § 10(c).

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Most sexually oriented programming appears on premium or pay-per-view channels that are naturally blocked from nonpaying customers by market forces, see In re Implementation of Section 10 of the Consumer Protection and Competition Act of 1992: Indecent Programming and Other Types of Materials on Cable Access Channels, First Report and Order, 8 FCC Rcd 998, 1001, n. 20 (1993) (First Report and Order), and it is only governmental intervention in the first instance that requires access channels, on which indecent programming may appear, to be made part of the basic cable package. Section 10(b) does nothing more than adjust the nature of Governmentimposed leased access requirements *832 in order to emulate the **2429 market forces that keep indecent programming primarily on premium channels (without permitting the operator to charge subscribers for that programming).

Unlike §§ 10(a) and (c), § 10(b) clearly implicates petitioners' free speech rights. Though § 10(b) by no means bans indecent speech, it clearly places contentbased restrictions on the transmission of private speech by requiring cable operators to block and segregate indecent programming that the operator has agreed to carry. Consequently, § 10(b) must be subjected to strict scrutiny and can be upheld only if it furthers a compelling governmental interest by the least restrictive means available. See Sable. 492 U.S.. at 126, 109 S.Ct., at 2836-2837. The parties agree that Congress has a "compelling interest in protecting the physical and psychological well-being of minors" and that its interest "extends to shielding minors from the influence of [indecent speech] that is not obscene by adult standards." Ibid. See Ginsberg v. New York. 390 U.S. 629, 639, 88 S.Ct. 1274, 1280, 20 L.Ed.2d 195 (1968) (persons "who have th[e] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility"). Because § 10(b) is narrowly tailored to achieve that well-established compelling interest, I would uphold it. I therefore dissent from the Court's decision to the contrary.

Our precedents establish that government may support parental authority to direct the moral upbringing of their children by imposing a blocking requirement as a default position. For example, in Ginsberg, in

which we upheld a State's ability to prohibit the sale of indecent literature to minors, we pointed out that the State had simply imposed its own default choice by noting that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." Ibid. Likewise, in Sable we set aside a complete ban on indecent dial-aporn messages in part because the FCC had previously imposed certain default rules intended to prevent access by minors, *833 and there was no evidence that those rules were ineffective. 492 U.S., at 128-130, 109 S.Ct., at 2837-2839. FN15

> FN15. After Sable, Congress quickly amended the statute and the FCC again promulgated those "safe harbor" rules. Those rules were later upheld against a First Amendment challenge. See Dial Information Servs. Corp. of N.Y. v. Thornburgh, 938 F.2d 1535 (C.A.2 1991), cert. denied, 502 U.S. 1072, 112 S.Ct. 966, 117 L.Ed.2d 132 (1992); Information Providers' Coalition for Defense of First Amendment v. FCC, 928 F.2d 866 (C.A.9 1991). In promulgating regulations pursuant to § 10(b), the FCC was well aware that the default rules established for dial-a-poin had been upheld and asserted that similar rules were necessary for leased access channels. See First Report and Order, 8 FCC Rcd 998, 1000 (1993) ("The blocking scheme upheld in these cases is, in all relevant respects, identical to that required by section 10(b)"); ibid ("[J]ust as it did in section 223 relating to 'dial-a-porn' telephone services-Congress has now determined that mandatory, not voluntary, blocking is essential").

The Court strikes down § 10(b) by pointing to alternatives, such as reverse blocking and lockboxes, that it says are less restrictive than segregation and blocking. Though these methods attempt to place in parents' hands the ability to permit their children to watch as little, or as much, indecent programming as the parents think proper, they do not effectively support parents' authority to direct the moral upbringing of their children. See First Report and Order, 8 FCC Rcd. at 1000-1001. FN16 The FCC recognized that leased access programming comes "from a wide variety of independent sources, with no single editor controlling [its] selection and presentation." Id., at 1000.

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Thus, indecent programming on leased access channels is "especially likely to be shown randomly or intermittently between non-indecent programs." *Ibid.* Rather than being able to simply block out certain channels at certain times, a subscriber armed with only a lockbox must carefully monitor all leased access programming and constantly reprogram the lockbox *834 to keep out undesired programming. Thus, even assuming that cable subscribers generally have the technical proficiency to properly operate a lockbox, by no means a given, this distinguishing characteristic of leased access channels makes lockboxes**2430 and reverse blocking largely ineffective.

FN16. In the context of dial-a-porn, courts upholding the FCC's mandatory blocking scheme have expressly found that voluntary blocking schemes are not effective. See <u>Dial Information Servs. supra. at 1542; Information Providers' Coalition, supra.</u> at 873-874.

Petitioners argue that § 10(b)'s segregation and blocking scheme is not sufficiently narrowly tailored because it requires the viewer's "written consent," 47 CFR § 76.701(b) (1995); it permits the cable operator 30 days to respond to the written request for access, § 76.701(c); and it is impermissibly underinclusive because it reaches only leased access programming.

Relying on Lamont v. Postmaster General, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965), petitioners argue that forcing customers to submit a written request for access will chill dissemination of speech. In Lamont, we struck down a statute barring the mail delivery of " 'communist political propaganda' " to persons who had not requested the Post Office in writing to deliver such propaganda. Id., at 307, 85 S.Ct., at 1496. The law required the Post Office to keep an official list of persons desiring to receive communist political propaganda, id., at 303, 85 S.Ct.. at 1494-1495, which, of course, was intended to chill demand for such materials. Here, however, petitioners' allegations of an official list "of those who wish to watch the 'patently offensive' channel," as the majority puts it, ante, at 2391, are pure hyperbole. The FCC regulation implementing § 10(b)'s written request requirement, 47 CFR § 76.701(b) (1995), says nothing about the creation of a list, much less an official Government list. It requires only that the cable operator receive written consent. Other statutory provisions make clear that the cable operator may not share that, or any other, information with any other person, including the Government. Section 551 mandates that all personally identifiable information regarding a subscriber be kept strictly confidential and further requires cable operators to destroy any information that is no longer necessary for the purpose for which it was collected. 47 U.S.C. § 551. *835 None of the circumstances that figured prominently in Lamont exists here.

Though petitioners cannot reasonably fear the specter of an officially published list of leased access indecency viewers, it is true that the fact that a subscriber is unblocked is ascertainable, if only by the cable operator. I find no legally significant stigma in that fact. If a segregation and blocking scheme is generally permissible, then a subscriber's access request must take some form, whether written or oral, and I see nothing nefarious in Congress' choice of a written, rather than an oral, consent. Entry Any request for access to blocked programming-by whatever methodultimately will make the subscriber's identity knowable. Entry But this is hardly the kind of chilling effect that implicates the First Amendment.

FN17. Because, under the circumstances of these cases, I see no constitutionally significant difference between a written and an oral request to see blocked programming, I also see no relevant distinction between § 10(b) and the blocking requirement enacted in the 1996 Act, on which the majority places so much reliance. See ante, at 2392.

FN18. Indeed, persons who request access to blocked programming pursuant to 47 CFR § 76.701(c) (1995) are no more identifiable than persons who subscribe to sexually oriented premium channels, because those persons must specially request that premium service.

Though making an oral request for access, perhaps by telephone, is slightly less bothersome than making a written request, it is also true that a written request is less subject to fraud "by a determined child." *Ante*, at 2393. Consequently, despite the fact that an oral request is slightly less restrictive in absolute terms, it is also less effective in supporting parents' interest in

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denying enterprising, but parentally unauthorized, minors access to blocked programming.

The segregation and blocking requirement was not intended to be a replacement for lockboxes, V-chips, reverse blocking, or other subscriber-initiated measures. Rather, Congress enacted in § 10(b) a default setting under which a subscriber receives no blocked programming without a writtenrequest.*836 Thus, subscribers who do not want the blocked programming are protected, and subscribers who do want it may request access. Once a subscriber requests access to blocked programming, however, the subscriber remains free to use other methods, such as lockboxes, to regulate the kind of programming shown on those channels in **2431 that home. FN19 Thus, petitioners are wrong to portray § 10(b) as a highly ineffective method of screening individual programs, see Brief for Petitioners in No. 95-124, at 43, and the majority is similarly wrong to suggest that a person cannot "watch a single program ... without letting the 'patently offensive' channel in its entirety invade his household for days, perhaps weeks, at a time," ante, at 2391; see ante, at 2392. Given the limited scope of § 10(b) as a default setting, I see nothing constitutionally infirm about Congress' decision to permit the cable operator 30 days to unblock or reblock the segregated channel.

FN19. The lockbox provision, originally passed in 1984, was unaffected by the 1992 Act and remains fully available to every subscriber. 47 U.S.C. § 544(d)(2).

Petitioners also claim that § 10(b) and its implementing regulations are impermissibly underinclusive because they apply only to leased access programming. In R.A.V. v. St. Paul, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), we rejected the view that a content-based restriction is subject to a separate and independent "underinclusiveness" evaluation. Id., at 387, 112 S.Ct., at 2545 ("In our view, the First Amendment imposes not an 'underinclusiveness' limitation but a 'content discrimination' limitation upon a State's prohibition of proscribable speech"). See also ante, at 2393 ("Congress need not deal with every problem at once"). Also, petitioners' claim is in tension with the constitutional principle that Congress may not impose a remedy that is more restrictive than necessary to satisfy its asserted compelling interest and with their own arguments pressing that very principle. Cf. R.A.V., supra. at 402, 112 S.Ct., at 2553-2554 (White, J., concurring in judgment) (though the "overbreadth doctrine *837 has the redeeming virtue of attempting to avoid the chilling of protected expression," an underbreadth challenge "serves no desirable function").

In arguing that Congress could not impose a blocking requirement without also imposing that requirement on public access and nonaccess channels, petitioners fail to allege, much less argue, that doing so would further Congress' compelling interest. While it is true that indecent programming appears on nonaccess channels, that programming appears almost exclusively on "per program or per channel services that subscribers must specifically request in advance, in the same manner as under the blocking approach mandated by section 10(b)." First Report and Order, 8 FCC Rcd. at 1001, n. 20. FN20 In contrast to these premium services, leased access channels are part of the basic cable package, and the segregation and blocking scheme Congress imposed does nothing more than convert sexually oriented leased access programming into a free "premium service." FN21 Similarly, Congress' failure to impose segregation and blocking requirements on public access channels may have been based on its judgment that those channels presented a less severe problem of unintended indecency-it appears that most of the anecdotal evidence before Congress involved leased access channels. Congress may also have simply decided*838 to permit the States and local franchising authorities to address the issue of indecency on public access channels at a local level, in accordance with the local rule policies evinced in 47 U.S.C. § 531 In any event, if the segregation and blocking scheme established by Congress is narrowly tailored to achieve a compelling governmental interest, it does not become constitutionally suspect merely because Congress did not extend the same restriction to other channels **2432 on which there was less of a perceived problem (and perhaps no compelling interest).

FN20. In examining the restrictions imposed by the 1996 Act, the majority is probably correct to doubt that "sex-dedicated channels are all (or mostly) leased channels," ante, at 2392, but surely the majority does not doubt that most nonleased sex-dedicated channels are premium channels

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that must be expressly requested. I thus disagree that the provisions of the 1996 Act address a "highly similar problem." *Ante*, at 2393.

FN21. Unlike Congress' blocking scheme, and the market norm of requiring viewers to pay a premium for indecent programming, lockboxes place a financial burden on those seeking to avoid indecent programming on leased access channels. See 47 U.S.C. § 544(d)(2) ("[A] cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber").

The United States has carried its burden of demonstrating that § 10(b) and its implementing regulations are narrowly tailored to satisfy a compelling governmental interest. Accordingly, I would affirm the judgment of the Court of Appeals in its entirety. I therefore concur in the judgment upholding § 10(a) and respectfully dissent from that portion of the judgment striking down §§ 10(b) and (c).

U.S.Dist.Col., 1996.

Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.

518 U.S. 727, 116 S.Ct. 2374, 135 L.Ed.2d 888, 64 USLW 4706, 96 Cal. Daily Op. Serv. 4792, 96 Daily Journal D.A.R. 7697, 3 Communications Reg. (P&F) 545

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Page 1

943 F.Supp. 1357 943 F.Supp. 1357, 5 Communications Reg. (P&F) 484 (Cite as: 943 F.Supp. 1357)

P

United States District Court, S.D. New York.

TIME WARNER CABLE OF NEW YORK CITY, A DIVISION OF TIME WARNER ENTERTAINMENT COMPANY, L.P., Paragon Communications d/b/a Time Warner Cable of New York City, Queens Inner Unity Cable Systems d/b/a Quics and TWC Cable Partners d/b/a Staten Island Cable, Plaintiffs,

CITY OF NEW YORK, Defendant, Bloomberg, L.P., Intervenor-Defendant. No. 96 CIV. 7736 (DLC).

Nov. 6, 1996.

Group of cable television operators brought action against city, seeking preliminary injunction after city placed financial news program on one of city's public, educational, and governmental use (PEG) cable channels and prepared to place commercial network 24-hour news program on another PEG channel, in attempt to induce group to place network news program on group's commercial cable channel, and alleging violation of, inter alia, franchise agreements, Cable Communications Policy Act, and First Amendment. Financial news programmer intervened. The District Court, Cote, J., held that: (1) city's actions violated Act provision governing use of channel capacity for governmental use; (2) franchise agreements did not permit city to place subject programs on government channel, regardless of whether programs were shown with or without commercials, absent written permission from operator; (3) city's placement of subject programs on PEG channels violated Act provision prohibiting franchising authority from imposing requirements as to provision or content of cable services; (4) group did not have right under Act to use PEG channels and, thus, group did not have First Amendment right to editorial discretion in those channels; (5) city had acted to compel group to add 24-hour news program to its system of commercial channels, those actions had direct, immediate, and chilling effect on group's exercise of its editorial discretion protected under First Amendment, and, thus, group had carried its burden of establishing irreparable harm; (6) group had right under First Amendment to be free from government interference with its programming decisions; and (7) city's actions did not pass strict scrutiny

under First Amendment and, thus, group had shown likelihood of success on merits of its claim that city had violated group's First Amendment right to exercise editorial discretion.

Preliminary injunction granted.

West Headnotes

[1] Telecommunications 372 = 1230

372 Telecommunications
372VI Cable Television
372k1229 Program Content; Access Rules
372k1230 k. In General. Most Cited Cases
(Formerly 372k457(1), 372k449.5(1))

Cable Communications Policy Act was intended to recognize and endorse preexisting practice of local franchise authorities conditioning their cable television franchises on granting of public, educational, and governmental use (PEG) channel access. Communications Act of 1934, § 611(a, e), as amended, 47 U.S.C.A. § 531(a, e).

|2| Telecommunications 372 1230

372 Telecommunications
 372VI Cable Television
 372k1229 Program Content; Access Rules
 372k1230 k. In General. Most Cited Cases
 (Formerly 372k457(1), 372k449.5(1))

Public, educational, and governmental use (PEG) channel provisions of Cable Communications Policy Act merely ensure that states will not prohibit practice of local franchise authorities conditioning their cable television franchises on granting of PEG channel access, and preclude federal preemption challenges to such requirements. Communications Act of 1934, § 61(a, e), as amended, 47 U.S.C.A. § 531(a, e).

[3] Civil Rights 78 = 1457(1)

78 Civil Rights
78III Federal Remedies in General
78k1449 Injunction
78k1457 Preliminary Injunction
78k1457(1) k. In General Most Cited Cases
(Formerly 78k268)

Assertion of First Amendment rights does not automatically require finding of irreparable injury, thus entitling plaintiff to preliminary injunction if he shows likelihood of success on the merits; rather, plaintiffs must show chilling effect on free expression. <u>U.S.C.A. Const.Amend.</u> 1.

[4] Civil Rights 78 = 1457(1)

78 Civil Rights

78III Federal Remedies in General 78k1449 Injunction 78k1457 Preliminary Injunction

78k1457(1) k. In General. Most Cited Cases

(Formerly 78k268)

For First Amendment purposes, constitutional harm is not necessarily synonymous with irreparable harm necessary for issuance of preliminary injunction. <u>U.S.C.A.</u> <u>Const.Amend.</u> 1.

[5] Injunction 212 238.48

212 Injunction

212IV Preliminary and Interlocutory Injunctions 212IV(A) Grounds and Proceedings to Procure 212IV(A)3 Subjects of Relief

212k138.45 Public Officers, Boards and

Municipalities; Schools and Colleges

212k138.48 k. Enforcement of Statutes,

Rules or Ordinances. Most Cited Cases

When party moving for preliminary injunction seeks to stay governmental action taken in public interest pursuant to statutory or regulatory scheme, injunction should be granted only if moving party meets likelihood-of-success standard.

[6] Telecommunications 372 230

372 Telecommunications

372VI Cable Television

372k1229 Program Content; Access Rules 372k1230 k. In General. Most Cited Cases (Formerly 372k457(1), 372k449.5(1))

For purposes of Cable Communications Policy Act provision governing use of cable television channel capacity for public, educational, or governmental use (PEG), phrase "public, educational or governmental use" establishes limit on both identity of user and content of program. Communications Act of 1934, § 611(a), as amended, 47 U.S.C.A. § 531(a).

[7] Telecommunications 372 € 1230

372 Telecommunications

372VI Cable Television

372k1229 Program Content; Access Rules 372k1230 k. In General Most Cited Cases (Formerly 372k457(1), 372k449.5(1))

Neither cable television franchise agreement, nor party's actions, may violate substantive meaning of Cable Communications Policy Act provision governing use of cable television channel capacity for public, educational, or governmental use (PEG), although franchise agreement gives life to provision. Communications Act of 1934, § 611(a), as amended, 47 U.S.C.A. § 531(a).

18 Telecommunications 372 € 1244

372 Telecommunications

372VI Cable Television

372k1242 Judicial Review or Intervention 372k1244 k. Injunction. Most Cited Cases

(Formerly 372k458(2), 372k449.10(2))

For purposes of determining whether to grant preliminary injunction against city regarding its placement of commercial financial news and 24-hour news programs on its public, educational, and governmental use (PEG) cable television channels, city's actions violated Cable Communications Policy Act provision governing use of channel capacity for governmental use; city's decision to air 24-hour news program, substantially identical to that aired on commercial channels, with relatively minor exception of inclusion of some minutes of local news, was use of PEG channel in a way clearly unintended by Congress, as city's use of its PEG channels was at odds with Act purposes of desire to respond to local needs, create space for otherwise unheard voices, air programs needed by community that would not otherwise be commercially viable, and show local government at work on governmental channels. Communications Act of 1934, § 611(a), as amended, 47 U.S.C.A. § 531(a).

19 Telecommunications 372 1230

372 Telecommunications

372VI Cable Television

372k1229 Program Content; Access Rules 372k1230 k. In General. Most Cited Cases (Formerly 372k457(1), 372k449.5(1))

"Governmental use" envisioned by Cable Communica-

tions Policy Act provision governing use of cable television channel capacity for governmental use is goal of showing the public local government at work. Communications Act of 1934, § 611(a), as amended, 47 U.S.C.A. § 531(a).

[10] Telecommunications 372 1230

372 Telecommunications

372VI Cable Television

372k1229 Program Content; Access Rules 372k1230 k. In General, Most Cited Cases

(Formerly 372k457(1), 372k449.5(1))

For purposes of Cable Communications Policy Act provision governing use of cable television channel capacity for public, educational, or governmental use (PEG), Act imposes limits on governmental use, and fact that user is government does not preclude violation of provision without regard to use of channel. Communications Act of 1934, § 611(a), as amended, 47 U.S.C.A. § 531(a).

[11] Telecommunications 372 230

372 Telecommunications

372VI Cable Television

372k1229 Program Content; Access Rules 372k1230 k, In General. Most Cited Cases

(Formerly 372k457(1), 372k449.5(1))

For purposes of Cable Communications Policy Act provision governing use of cable television channel capacity for public, educational, or governmental use (PEG), underlying purposes to PEG channels include desire to respond to local needs, create space for voices that would not otherwise be heard, air programs needed by community that may not otherwise be commercially viable, and, for governmental channels, show local government at work. Communications Act of 1934, § 611(a), as amended, 47 U.S.C.A. § 531(a).

[12] Telecommunications 372 =1244

372 Telecommunications

372VI Cable Television

372k1242 Judicial Review or Intervention

372k1244 k. Injunction. Most Cited Cases

(Formerly 372k458(2), 372k449.10(2))

For purposes of determining whether to grant preliminary injunction against city regarding its placement of commercial financial news and 24-hour news programs on its public, educational, and governmental use (PEG) cable

television channels, city's franchise agreements with cable television operators did not permit city to place those programs on government channel, regardless of whether programs were shown with or without commercials, absent written permission from operator; franchise agreements contemplated only noncommercial uses for PEG stations, and programs were commercial in nature, given one programmer's clear commercial intentions and other programmer's admissions. Communications Act of 1934, § 611(a), as amended, 47 U.S.C.A. § 531(a).

[13] Contracts 95 0 143(2)

95 Contracts

95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General

95k143(2) k. Existence of Ambiguity. Most

Cited Cases

For contract interpretation purposes, existence of debate between parties as to interpretation of contract language does not create ambiguity.

[14] Evidence 157 397(2)

157 Evidence

157XI Parol or Extrinsic Evidence Affecting Writings
157XI(A) Contradicting, Varying, or Adding to
Terms of Written Instrument

157k397 Contracts in General

157k397(2) k. Completeness of Writing and Presumption in Relation Thereto; Integration. Most Cited Cases

Evidence 157 \$\infty\$ 461(1)

157 Evidence

157XI Parol or Extrinsic Evidence Affecting Writings
157XI(D) Construction or Application of Language of Written Instrument

157k461 Showing Intent of Parties as to Sub-

ject-Matter

157k461(1) k. In General Most Cited Cases Court may rely on parol evidence, not to vary or add to terms of contract, but only to interpret and give effect to parties' intent, even if contract contains merger clause.

[15] Contracts 95 € 170(1)

95 Contracts

95II Construction and Operation
95II(A) General Rules of Construction
95k170 Construction by Parties
95k170(1) k. In General. Most Cited Cases
Parties' interpretation of contract in practice, prior to litigation, is compelling evidence of parties' intent.

[16] Telecommunications 372 1244

372 Telecommunications
372VI Cable Television
372k1242 Judicial Review or Intervention
372k1244 k. Injunction Most Cited Cases
(Formerly 372k458(2), 372k449 10(2))

For purposes of determining whether to grant preliminary injunction against city regarding its placement of commercial financial news and 24-hour news programs on its public, educational, and governmental use (PEG) cable television channels, city's placement of those programs on PEG channels violated Cable Communications Policy Act provision prohibiting franchising authority from imposing requirements as to provision or content of cable services, in light of conclusion that city's actions also violated First Amendment U.S.C.A. Const.Amend. 1; Communications Act of 1934, § 624(f)(1), as amended, 47 U.S.C.A. § 544(f)(1).

[17] Constitutional Law 92 2140

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press
92XVIII(W) Telecommunications and Computers
92k2139 Cable and Satellite Television Systems; Community Antenna Systems

92k2140 k. In General. Most Cited Cases (Formerly 92k90.1(9))

Cable television programmers and cable operators engage in and transmit speech and are entitled to protection of speech and press provisions of First Amendment. U.S.C.A. Const.Amend. 1.

[18] Constitutional Law 92 € 2140

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press
92XVIII(W) Telecommunications and Computers
92k2139 Cable and Satellite Television Systems; Community Antenna Systems
92k2140 k. In General. Most Cited Cases

92k2140 k. In General. Most Cited Cases (Formerly 92k90.1(9)) For First Amendment purposes, in determining whether cable television regulation is content-based or content-neutral, as a general rule, laws that by their terms distinguish favored speech from disfavored speech on basis of ideas or views expressed are "content-based"; by contrast, laws that confer benefits or impose burdens on speech without reference to ideas or views expressed are in most instances "content-neutral." U.S.C.A. Const.Amend. 1.

1191 Constitutional Law 92 2140

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press
92XVIII(W) Telecommunications and Computers
92k2139 Cable and Satellite Television Systems; Community Antenna Systems
92k2140 k. In General. Most Cited Cases
(Formerly 92k90.1(9))

Telecommunications 372 1230

372 Telecommunications

372VI Cable Television

372k1229 Program Content; Access Rules 372k1230 k. In General. Most Cited Cases (Formerly 372k457(1), 372k449.5(1))

For purposes of determining propriety of cable television regulation under First Amendment, court must draw from other areas of First Amendment jurisprudence with care, since cable industry involves unique First Amendment concerns. U.S.C.A. Const.Amend. 1.

1201 Constitutional Law 92 5 1507

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press 92XVIII(A) In General

92XVIII(A)1 In General

92k1507 k. Viewpoint or Idea Discrimina-

tion. Most Cited Cases

(Formerly 92k90(1))

Viewpoint-based discrimination against speech, as opposed merely to content-based discrimination, is particularly unacceptable under First Amendment <u>U.S.C.A.</u> Const. Amend. 1.

[21] Constitutional Law 92 71507

92 Constitutional Law 92XVIII Freedom of Speech, Expression, and Press 943 F.Supp. 1357

943 F.Supp. 1357, 5 Communications Reg. (P&F) 484

(Cite as: 943 F.Supp. 1357)

92XVIII(A) In General 92XVIII(A)1 In General

92k1507 k. Viewpoint or Idea Discrimina-

tion. Most Cited Cases

(Formerly 92k90(1))

For First Amendment purposes, viewpoint discrimination against speech is egregious form of content discrimination. U.S.C.A. Const. Amend. 1.

[22] Constitutional Law 92 1490

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General 92XVIII(A)1 In-General

92k1490 k. In General. Most Cited Cases

(Formerly 92k90(1))

For First Amendment purposes, government must abstain from regulating speech when specific motivating ideology or opinion or perspective of speaker is rationale for restriction. U.S.C.A. Const. Amend. 1.

1231 Constitutional Law 92 2140

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press
92XVIII(W) Telecommunications and Computers
92k2139 Cable and Satellite Television Systems; Community Antenna Systems

92k2140 k. In General. Most Cited Cases (Formerly 92k90.1(9))

Constitutional Law 92 2142

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press
92XVIII(W) Telecommunications and Computers
92k2139 Cable and Satellite Television Systems; Community Antenna Systems

92k2142 k. Public or Local Access or Pro-

gramming. Most Cited Cases (Formerly 92k90.1(9))

Telecommunications 372 € 1230

372 Telecommunications

372VI Cable Television

372k1229 Program Content; Access Rules
372k1230 k. In General. Most Cited Cases
(Formerly 372k457(1), 372k449.5(1))

Group of cable television operators did not have right under Cable Communications Policy Act to use channels designated for public, educational, and governmental use (PEG) and, thus, group did not have First Amendment right to editorial discretion in those channels, for purposes of group's action against city, seeking preliminary injunction against city regarding city's placement of commercial financial news and 24-hour news programs on its PEG cable television channels; neither Act provision governing operator's use of unused PEG channel capacity, nor Act provision stating that franchising authority may establish franchise requirements as to PEG channel capacity only to extent provided in statutory section, provided group right to use PEG channels. U.S.C.A. Const. Amend. 1; Communications Act of 1934, § 611(a, d), as amended, 47 U.S.C.A. § 531(a. d).

[24] Telecommunications 372 1230

372 Telecommunications

372VI Cable Television

372k1229 Program Content; Access Rules 372k1230 k. In General. Most Cited Cases

(Formerly 372k457(1), 372k449.5(1))

In Cable Communications Policy Act provision governing cable television operator's use of unused public, educational, and governmental use (PEG) channel capacity, Congress intended that any PEG-designated channel which had been fallow be returned to franchise authority for its use as quickly as possible when PEG programming becomes available for it. Communications Act of 1934, § 611(d), as amended, 47 U.S.C.A. § 531(d).

[25] Telecommunications 372 = 1230

372 Telecommunications

372VI Cable Television

372k1229 Program Content; Access Rules 372k1230 k. In General. Most Cited Cases

(Formerly 372k457(1), 372k449.5(1))

Cable Communications Policy Act provision describing proper use of cable television channel designated for public, educational, and governmental use (PEG) does not establish underlying right of cable operator to such channels. Communications Act of 1934, § 611(a), as amended, 47 U.S.C.A. § 531(a).

|26| Telecommunications 372 1230

372 Telecommunications

372VI Cable Television

372k1229 Program Content; Access Rules 372k1230 k. In General Most Cited Cases (Formerly 372k457(1), 372k449.5(1))

Rights to cable television channels designated for public, educational, and governmental use (PEG) were created simultaneously at time franchise agreements between city and cable operators were signed. Communications Act of 1934, § 611(a, d), as amended, 47 U.S.C.A. § 531(a, d).

[27] Telecommunications 372 1214

372 Telecommunications

372VI Cable Television

372k1213 Franchises and Licenses; Local Regula-

tion

372k1214 k. In General Most Cited Cases (Formerly 372k455(1), 372k449(6.1))

Telecommunications 372 € 1217

372 Telecommunications

372VI Cable Television

372k1213 Franchises and Licenses; Local Regulation

372k1217 k. Termination and Amendment. Most Cited Cases

(Formerly 372k455(4), 372k449(9))

Editorial discretion of cable television operator is function of cable franchise it receives from local government; operator's right to exercise any editorial discretion over cable services disappears if its franchise is terminated.

[28] Telecommunications 372 =1244

372 Telecommunications

372VI Cable Television

372k1242 Judicial Review or Intervention 372k1244 k Injunction. Most Cited Cases

(Formerly 372k458(2), 372k449.10(2))

For purposes of determining whether to grant preliminary injunction against city regarding its placement of commercial financial news and 24-hour news programs on its public, educational, and governmental use (PEG) cable television channels, city, through its course of conduct, had acted to compel group of cable operators to add 24-hour news program to its system of commercial channels, those actions had direct, immediate, and chilling effect on group's exercise of its editorial discretion protected under First Amendment, and, thus, group had carried its burden

of establishing irreparable harm; city could not select particular program to place on its PEG channels that did not belong on such channel, with specific purpose of overriding group's editorial discretion by forcing group to alter its editorial decision. <u>U.S.C.A. Const.Amend. 1</u>; Communications Act of 1934, § 611(a), as amended, <u>47 U.S.C.A.</u> § 531(a).

[29] Constitutional Law 92 2140

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press
92XVIII(W) Telecommunications and Computers
92k2139 Cable and Satellite Television Systems; Community Antenna Systems
92k2140 k. In General. Most Cited Cases
(Formerly 92k90.1(9))

Constitutional Law 92 2142

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press
92XVIII(W) Telecommunications and Computers
92k2139 Cable and Satellite Television Systems; Community Antenna Systems

92k2142 k. Public or Local Access or Programming. Most Cited Cases
(Formerly 92k90.1(9))

Telecommunications 372 1244

372 Telecommunications

372VI Cable Television

372k1242 Judicial Review or Intervention 372k1244 k. Injunction. Most Cited Cases

(Formerly 372k458(2), 372k449.10(2))

Group of cable television operators had right under First Amendment to be free from government interference with its programming decisions, for purposes of group's action against city, seeking preliminary injunction against city regarding city's placement of commercial financial news and 24-hour news programs on city's public, educational, and governmental use (PEG) cable television channels. U.S.C.A. Const.Amend. 1; Communications Act of 1934, § 611(a), as amended, 47 U.S.C.A. § 531(a).

[30] Constitutional Law 92 2140

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press

92XVIII(W) Telecommunications and Computers
92k2139 Cable and Satellite Television Systems; Community Antenna Systems
92k2140 k. In General. Most Cited Cases
(Formerly 92k90.1(9))

Constitutional Law 92 2142

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press
92XVIII(W) Telecommunications and Computers
92k2139 Cable and Satellite Television Systems; Community Antenna Systems
92k2142 k. Public or Local Access or Programming. Most Cited Cases
(Formerly 92k90.1(9))

Telecommunications 372 1244

372 Telecommunications
372VI Cable Television
372k1242 Judicial Review or Intervention
372k1244 k. Injunction. Most Cited Cases
(Formerly 372k458(2), 372k449.10(2))

For purposes of determining whether to grant preliminary injunction against city, city's decision to place commercial financial news and 24-hour news programs on city's public, educational, and governmental use (PEG) cable television channels was "content-based" and, thus, strict scrutiny under First Amendment applied to challenge by group of cable television operators to city's actions, where city chose 24-hour news program out of all other news programs, financial news program was admitted to PEG channels as "cover" for city's content-based choice of 24-hour news program, and city acted to punish group for exercising its editorial discretion to refuse 24-hour news program for its commercial channels. <u>U.S.C.A.</u> Const.Amend. 1; Communications Act of 1934, § 611(a), as amended, 47 U.S.C.A. § 531(a)

[31] Constitutional Law 92 2140

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press
92XVIII(W) Telecommunications and Computers
92k2139 Cable and Satellite Television Systems; Community Antenna Systems
92k2140 k. In General, Most Cited Cases

92k2140 k. In General. Most Cited Cases (Formerly 92k90.1(9))

For First Amendment purposes, content-neutral cable

television regulations are subject to intermediate scrutiny and content-based regulations are subject to strict scrutiny. U.S.C.A. Const.Amend. 1.

[32] Constitutional Law 92 1512

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press 92XVIII(A) In General

92XVIII(A)1 In General

92k1511 Content-Neutral Regulations or

Restrictions

92k1512 k. In General. Most Cited Cases (Formerly 92k90(3))

Constitutional Law 92 5 1517

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press 92XVIII(A) In General

92XVIII(A)1 In General

92k1516 Content-Based Regulations or Re-

strictions

92k1517 k. In General. Most Cited Cases (Formerly 92k90(3))

For First Amendment free speech purposes, in determining whether government action is content-neutral or content-based, court should consider government's purpose in taking action. <u>U.S.C.A. Const. Amend. 1</u>

[33] Constitutional Law 92 2140

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press
92XVIII(W) Telecommunications and Computers
92k2139 Cable and Satellite Television Systems; Community Antenna Systems

92k2140 k. In General Most Cited Cases (Formerly 92k90.1(9))

For First Amendment free speech purposes, if there is specific proof that any regulation is actually being used to punish cable television operator for discretionary programming decision, governmental action should be

viewed as content-based. U.S.C.A. Const. Amend. 1.

|34| Constitutional Law 92 2142

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press 92XVIII(W) Telecommunications and Computers

92k2139 Cable and Satellite Television Systems; Community Antenna Systems
92k2142 k. Public or Local Access or Programming. Most Cited Cases
(Formerly 92k90.1(9))

Telecommunications 372 1244

372 Telecommunications
372VI Cable Television
372k1242 Judicial Review or Intervention
372k1244 k. Injunction. Most Cited Cases
(Formerly 372k458(2), 372k449.10(2))

For purposes of determining whether to grant preliminary injunction against city regarding its placement of commercial financial news and 24-hour news programs on its public, educational, and governmental use (PEG) cable television channels, city's actions did not pass strict scrutiny under First Amendment and, thus, group of cable television operators had shown likelihood of success on merits of its claim that city had violated group's First Amendment right to exercise editorial discretion; city's asserted reasons for its actions, i.e., to ensure wide diversity of programming and promote city employment, had been used as pretexts and were not actual motivation for city's actions, and city had not narrowly tailored its actions to accomplish those asserted goals. U.S.C.A. Const. Amend. 1; Communications Act of 1934, § 611(a), as amended, 47 U.S.C.A. § 531(a).

[35] Constitutional Law 92 2142

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press
92XVIII(W) Telecommunications and Computers
92k2139 Cable and Satellite Television Systems; Community Antenna Systems

92k2142 k. Public or Local Access or Programming. Most Cited Cases
(Formerly 92k90.1(9))

Telecommunications 372 € 1244

372 Telecommunications
372VI Cable Television
372k1242 Judicial Review or Intervention
372k1244 k. Injunction. Most Cited Cases
(Formerly 372k458(2), 372k449.10(2))

For purposes of determining whether to grant preliminary injunction against city regarding its placement of com-

mercial financial news and 24-hour news programs on its public, educational, and governmental use (PEG) cable television channels, even assuming intermediate scrutiny applied, city's actions did not pass intermediate scrutiny under First Amendment and, thus, group of cable television operators had shown likelihood of success on merits of its claim that city had violated group's First Amendment right to exercise editorial discretion; viewpoint favoritism and speaker preference, which were city's true motivations, were not legitimate government purposes unrelated to suppression of free expression. <u>U.S.C.A.</u> <u>Const. Amend.</u> 1; Communications Act of 1934, § 611(a), as amended, 47 U.S.C.A. § 531(a)

|36| Constitutional Law 92 2142

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press
92XVIII(W) Telecommunications and Computers
92k2139 Cable and Satellite Television Systems; Community Antenna Systems
92k2142 k. Public or Local Access or Programming. Most Cited Cases
(Formerly 92k90.1(9))

Telecommunications 372 € 1244

372 Telecommunications
372VI Cable Television
372k1242 Judicial Review or Intervention
372k1244 k. Injunction Most Cited Cases
(Formerly 372k458(2), 372k449.10(2))

Issuance of preliminary injunction against city's placement of commercial financial news and 24-hour news programs on its public, educational, and governmental use (PEG) cable television channels would not act as impermissible prior restraint on city's and programmers' speech under First Amendment; even assuming city had First Amendment rights, city could not wield its own First Amendment right as sword to force group of cable television operators to capitulate to city's demands and then claim same right as shield preventing court from granting relief, and deprivation of programmers' First Amendment rights was due to city's violation of its First Amendment obligations as state actor and, thus, was incidental. U.S.C.A. Const. Amend. 1; Communications Act of 1934, § 611(a, e), as amended, 47 U.S.C.A. § 531(a, e).

1371 Telecommunications 372 = 1230

372 Telecommunications 372VI Cable Television

372k1229 Program Content; Access Rules 372k1230 k. In General. Most Cited Cases (Formerly 372k457(1), 372k449.5(1))

Under Cable Communications Policy Act provision governing editorial control by cable television operator, group of cable operators could not interfere with city's programming decisions for city's public, educational, and governmental use (PEG) channels. Communications Act of 1934, § 611(e), as amended, 47 U.S.C.A. § 531(e).

*1362 Stuart W. Gold, Robert D. Joffe, Rory O. Millson,

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Martin Garbus, Maura Wogan, Edward H. Rosenthal, Edward Hernstadt, Frankfurt, Garbus, Klein & Selz, P.C., New York City, for Intervenor-Defendant Bloomberg L.P.

	D. Wilson, Christopher P. Bogart, Cravath,		
I. Background			
II. Facts		1364 1366	
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*1363 OPINION

COTE, District Judge:

This case concerns the power of a city to influence, control, and even coerce the programming decisions of an operator of a cable television system. It therefore goes to the heart of First Amendment concerns.

The pivotal event in this case occurred on October 1, 1996. On that date, the City of New York ("City") proposed to Time Warner Entertainment Company, L.P. ("Time Warner") FNI -a group of cable operators that provide cable service pursuant to franchise agreements with the City-a plan that called *1364 for the City to abandon one of its cable channels designated for public, educational and governmental use ("PEG") if Time Warner would place the new Fox News program on one of Time Warner's commercial cable channels. Time Warner refused to "swap" channels with the City in order to accommodate Fox News. Unwilling to accept Time Warner's decision, a decision protected by the First Amendment and a federal statute, the City raised the ante over the ensuing days in an effort to convince Time Warner to change its mind. This campaign culminated on October 10, 1996, when the City placed Bloomberg Information Television ("BIT") on one of its PEG channelsspecifically, a channel set aside for educational or governmental use-and prepared to place Fox News on another PEG channel. This action, intended to compel Time Warner to capitulate, instead has brought the parties before this Court.

FN1. I refer to the various related entities that are plaintiffs in this action as "Time Warner." These entities include Time Warner Cable of New York City, an unincorporated division of Time Warner Entertainment Company, L.P., that operates cable systems in New York City pursuant to franchise agreements with the City dated 1983 and 1990. Plaintiffs also include Paragon Communications, an individual franchisee that operates a cable system pursuant to the 1990 franchise agreement with the City, and Queens Inner Unity Cable Systems and TWC Cable Partners, which both operate cable systems pursuant to the 1983 franchise agreement.

So long as there remains a limitation on the number of cable channels, and intense competition over access to this valuable resource, there is a potential for a dispute of this nature to arise. Fortunately, however, the exercise of government power at issue here is without precedent. Given the irregularity of the City's actions in this case, I need not definitively decide each of the difficult issues, including a fine determination about the appropriate use of PEG channels under the Cable Communications Policy Act of 1984 ("Cable Act"). Pub.L. No. 98-549. 98 Stat. 2779 (codified at 47 U.S.C. § 521et seq.) Nonethe-

less, I do find that the City's actions are far beyond acceptable PEG use, that the City acted in contravention of the legislative purposes of the Cable Act, and, specifically, violated the provisions relating to PEG use and the editorial autonomy of a cable operator. Most importantly, I find that by engaging in an effort to compel Time Warner to alter its constitutionally-protected editorial decision not to carry Fox News, the City has violated Time Warner's First Amendment rights.

I. Background

Time Warner brought this action for preliminary injunction against the City on October 10, 1996. Defendant City is a municipal corporation organized under the laws of the State of New York. Defendant-intervenor Bloomberg L.P. ("Bloomberg") intervened in the action on October 16, 1996. Bloomberg is a news service that specializes in covering financial news and produces BIT.

Time Warner's complaint alleges that the City's actions violate the franchise agreements, the Cable Act, and the First Amendment. The complaint also alleges that if the City's actions are allowed under the Cable Act, then the Act violates the First Amendment as applied. Finally, the complaint alleges that the City's actions violate the Takings Clause of the Fifth Amendment, New York State law, the New York State Constitution, and the New York City Charter.

On October 11, 1996, this Court held a hearing on Time Warner's application for a temporary restraining order ("TRO") enjoining the City from continuing to show BIT and from placing Fox News on the Crosswalks Network ("Crosswalks"), a group of cable channels set aside for educational and governmental use and supervised by the City. After hearing the parties, this Court granted Time Warner's motion for a TRO. A hearing on Time Warner's application for a preliminary injunction was set for October 23, 1996, and at the City's request an extension was subsequently granted to October 28. The parties agreed, pursuant to this Court's rules, to have the direct testimony of all witnesses presented by affidavit. Prior to the hearing, the parties were to designate which witnesses they wished to cross-examine in person.

FN2. While Bloomberg was not a formal party at the time of the TRO hearing, the Court heard argument from Bloomberg's counsel, and Jonathan Fram, Bloomberg's general manager of television news, was the only witness called at the TRO

hearing.

Time Warner submitted affidavits from Richard Aurelio, President of New York City Cable Group FN3; Allan J. Arffa, outside counsel*1365 to Time Warner; Fred Dressler, Senior Vice President of Programming at Time Warner Cable; Spencer B. Hays, Vice President and Deputy General Counsel of Time Warner; Robert S. Jacobs, General Counsel of Time Warner's New York City Cable Group; Stuart J. Lipson, an independent consultant specializing in developing competitive strategies, particularly in the cable industry; Gary McBride, President and CEO of GEMS International Television; Gregory Moore, Executive Director of Northwest Community Television; George William Nichols, President and CEO of Kaleidoscope Network, Inc.; Richard D. Parsons, President of Time Warner; Barry Rosenblum, President of Time Warner Cable of New York City; George C. Stoney, professor of film and television at NYU; and Lynn Yaeger, Senior Vice President of Corporate Affairs for Time Warner Cable.

FN3. Mr. Aurelio's affidavit was submitted in connection with Time Warner's request for a TRO. He also submitted a supplemental affidavit in connection with the request for a preliminary injunction.

Time Warner submitted deposition excerpts from Allan Arffa; Richard Aurelio; Walter de la Cruz, Director of Cable Television Franchises and Policy at the City Department of Information Technology and Telecommunications ("DoITT"): Fred Dressler: Barry R. Forbes, Executive Director of the Alliance for Community Media; James Honiotes, Vice President of Distribution for Jones Education Company, the producer of Knowledge TV; Robert S. Jacobs; David B. Klasfeld, Chief of Staff to Fran Reiter; Gary S. Lutzker, Telecommunications Counsel at DoITT; Randy Mastro, Deputy Mayor for Operations; Gary McBride; John T. McCormick, Assistant Commissioner of DoITT; Gregory Moore; Craig Muraskin, Special Assistant to Fran Reiter; George William Nichols; Alex Quinn, Executive Director and President of Manhattan Neighborhood Network; Bruce Regal, an attorney in the New York City Law Department; Elaine S. Reiss, General Counsel of DoITT; Fran Reiter, Deputy Mayor for Economic Development and Planning; Ted Turner, Vice Chairman of Time Warner; Salvador C. Uy, former Assistant Commissioner for Cable Television and Telecommunications Policy for DoITT; and Lynn Yaeger.

The City submitted affidavits or affirmations from Paul A. Crotty, Corporation Counsel for the City; David B. Klasfeld; Craig Muraskin; Burt Neuborne, professor of constitutional law at NYU FM; Elaine S. Reiss; Fran Reiter; and Salvador C. Uy. The City submitted deposition excerpts from Richard Aurelio, Walter de la Cruz, Fred Dressler, Spencer B. Hays, Robert S. Jacobs, Gary S. Lutzker, Randy Mastro, John T. McCormick, Craig Muraskin, Bruce Regal, Elaine Reiss, Fran Reiter, Barry Rosenblum, Ted Turner, Salvador C. Uy, and Lynn Yaeger.

FN4. Because the legal discussion contained in Professor Neuborne's affidavit was more appropriate for a legal brief, the Court allowed the City to resubmit Professor Neuborne's affidavit as an amicus brief.

Bloomberg submitted affidavits from Michael R. Bloomberg, President of Bloomberg L.P.; Leon Friedman, constitutional law professor at Hofstra Law School ENS; Joseph D. LaRocco, Television and Cable Services Manager for television station KACT in Aurora, Colorado ENS, Michael I. Meyerson, communications law professor at the University of Baltimore School of Law ENZ; and Dean Smits, Director of the Office of Telecommunications for the City and County of Denver, Colorado. Bloomberg submitted deposition excerpts from Richard Aurelio, Walter de la Cruz, Fred Dressler, Barry Forbes, James Honiotes, Robert S. Jacobs, David B. Klasfeld, Gary S. Lutzker, Gary McBride, John T. McCormick, Gregory Moore, George William Nichols, Elaine S. Reiss, Bruce Regal, Barry Rosenblum, Dean Smits, Ted Turner, and Lynn Yaeger.

<u>FN5.</u> As with Professor Neuborne's affidavit, Professor Friedman's affidavit was converted to an *amicus* brief for consideration by the Court.

FN6. On October 27, 1996, Bloomberg requested that the Court accept a supplemental affidavit from Mr. Larocco. The Court declined to do so, since the submission of all evidence in chief was to be made-with one exception allowing the City to take an additional deposition-on October 23, 1996.

<u>FN7.</u> Bloomberg redacted Professor Meyerson's affidavit to make it admissible.

The Court received several amicus curiae briefs. The fol-

lowing organizations and individuals submitted briefs which were supportive*1366 -though not always entirely-of Time Warner's position: Cablevision of New York City; Mark Green, Public Advocate of the City of New York, Ruth Messinger, Manhattan Borough President, and Fernando Ferrer, Bronx Borough President; Media Access New York ("MANY"); National Cable Satellite Corporation ("C-SPAN"); and National Cable Television Association, Inc. ("NCTA"). Fox News Network submitted a brief supportive of the City's position. The Alliance for Community Media FNB and the New York Civil Liberties Union filed briefs which were supportive in some respects of the positions of Time Warner, the City, and Bloomberg.

FN8. The Alliance for Community Media submitted an affidavit and a declaration from Barry R. Forbes, its Executive Director. The affidavit was received in evidence and the parties were given an opportunity to depose Forbes.

The hearing on the preliminary injunction took place from October 28 to 30, 1996. The parties chose not to call any witnesses for cross examination. Based on the testimony and the exhibits admitted into evidence, I make the following findings of fact and conclusions of law.

II. Facts

A. History and Statutory Structure of Federal Cable Law

Cable television systems were first built in the late 1940s to carry broadcast television signals to remote or mountainous areas. *Turner Broadcasting Sys., Inc. v. FCC.* 512 U.S. 622. ---. 114 S.Ct. 2445. 2451. 129 L.Ed.2d 497 (1994). The intent of these systems-called community antenna television (CATV) systems-was to extend the range of television services, not compete with them. *Id.* By the 1970s, however, cable television systems began developing and carrying their own programming in addition to broadcast channels. H.R.Rep. No. 98-934. at 20-21 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4658.

In contrast to broadcast television, which relies on electromagnetic signals transmitted from a central antenna and received by individual antennas in consumers' homes, cable systems rely on a physical connection: a signal is carried through a conventional or optical fiber cable that functions much like a telephone line. <u>Time Warner Entertainment Co. v. FCC</u>, 93 F.3d 957, 962 (D.C.Cir.1996). Indeed, cable television lines must be laid in the ground

and attached to poles in the same manner as telephone lines. To lay these cables, operators must obtain rights-of-way and easements from local governments. *Id.* at 962.

As a result of these physical exigencies, cable television is regulated at the local level. Operators negotiate franchise agreements with local governments—"franchising authorities" in the telecommunications lexicon-to obtain the rights-of-way necessary to lay the cable wires. H.R.Rep. No. 98-934 supra, at 19, reprinted in 1984 U.S.C.C.A.N. at 4656. While the regulatory landscape of the cable industry changed with the advent of federal legislation in 1984—amended by two subsequent acts in 1992 and 1996-local franchise agreements still determine much of the delivery of cable services, subject to these federal laws which define and limit local governments' authority. *Id.* at 19, reprinted in 1984 U.S.C.C.A.N. at 4656.

Currently, the industry is comprised of cable operators, who own the physical assets and franchises and transmit the signals, and cable programmers, who produce programs and sell them to the operators. Operators and programmers often have ownership interests in the other and are thus "vertically integrated" entities. *Time Warner*, 93 F.3d at 963. A cable operator offers programming that is made up of local and distant television broadcast signals, along with local, regional and national cable channels (such as CNN, ESPN, and the Weather Channel). Cable operators contract with each cable programmer individually.

Cable programmers earn money by selling advertising space on their programs and charging cable operators a set fee per subscriber, per month. Not all programs function this way: some do not sell advertising (such as HBO and C-SPAN) and some do not charge on a per subscriber, per month basis (such as the TV Food Network). Cable operators earn money by collecting fees from subscribers. Cable operators attempt to *1367 provide a selection of programs that will be attractive to subscribers.

1. The Cable Communications Policy Act of 1984

The Cable Act establishes national policy for the federal, state, and local regulation of the cable industry. The stated purposes of the law include the establishment of franchise procedures and standards to encourage the growth and development of cable systems and to assure that cable systems are responsive to the needs and interests of the local community, 47 U.S.C. § 521(2); the establishment of guidelines for the exercise of federal, state, and local

authority with respect to the regulation of cable systems, 47 U.S.C. § 521(3); and the assurance that cable systems will provide the widest possible diversity of information sources and services to the public, 47 U.S.C. § 521(4).

a. Statutory Provisions

The Cable Act establishes who, in addition to the operator, may have access to a cable system. To assure a cable system provides programming that is responsive to the needs of the local community, the Cable Act authorizes franchising authorities to require operators to set aside an undetermined number of channels for "public, educational and governmental use." 47 U.S.C. § 531(a). These stations are known as PEG channels or PEG access. The statutory provision does not further explain this use, but Congress's meaning and intent is apparent from the legislative history of the Cable Act, discussed below. Importantly, the statute does not require cable operators to carry such channels. Indeed, as of 1990, only sixteen percent of all cable systems nationwide had public access, thirteen percent had educational access, and eleven percent had governmental access $\frac{FNQ}{}$ The Cable Act does, however, give a franchising authority the power to require an operator to provide PEG channels. A franchise agreement gives life to Section 531(a), but Section 531(a) also establishes a framework for these franchise agreements: that the channels be set aside for public, educational, and governmental use.

FN9. Patricia Aufderheide, Cable Television and the Public Interest, 42 J. of Comm. 52, 58 (1992) (citing Television and Cable Factbook, 1990 C-384 (1990)).

Another provision makes clear that a different group of voices will be heard. Section 532 requires an operator with more than 36 channels (including PEG channels, but excluding the local commercial television stations that a cable operator must provide to subscribers pursuant to a 1992 amendment codified at 47 U.S.C. § 534) to set aside a percentage of those channels for use by entities unaffiliated with the operator. FN10 47 U.S.C. § 532. The stated purpose of this provision is to "assure that the widest possible diversity of information sources are made available to the public." 47 U.S.C. & 532(a). Under this provision, a cable programmer can "lease" a cable channel from a cable operator. While the Act terms this access "commercial use," 47 U.S.C. § 532, and it is popularly referred to as "leased access," the "commercial" in the statute refers to the nature of the lease, not the content of the programming or intent of the programmer. Section 532(b)(5) states that "the term 'commercial use' means the provision of video programming, whether or not for profit." Indeed, a nonprofit entity may lease a channel under this provision. 47 U.S.C. § 532(b)(5)(B).

FN10. For Time Warner's cable system in New York City, a system which offers 76-77 channels depending on the borough, Time Warner must set aside fifteen percent of the channels on the system. 47 U.S.C. § 532(b)(1)(B).

The statute also safeguards the editorial autonomy of operators, programmers, and PEG users. The programming decisions of cable operators are protected under 47 U.S.C. § 544(f)(1), which provides that "[a]ny federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter." Likewise, a cable operator has no editorial control over PEG channels pursuant to 47 U.S.C. § 531(e), which states that "a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to [the PEG provision]." Under *136847 U.S.C. § 532(c)(2) a cable operator "shall not exercise any editorial control over any video programming offered" under leased access.

b. A History of PEG

The PEG provisions of the Cable Act did not introduce a new practice to the cable industry. Since the 1960s local governments had conditioned franchise grants on the provision of PEG access. This was done in an effort to "create a more direct right of access to the video media." Daniel L. Brenner et al., Cable Television and Other Nonbroadcast Video: Law and Policy § 6.04[1], at 6-34 (1996). Communities saw cable as "the next public forum," akin to "public parks, libraries, theaters, and other public fora [that] ... encourage, or at least permit speech." Id. New York City has required PEG channels on cable systems since 1971. Id. § 6.04[2], at 6-34.1.

Nor was the Cable Act the first time the federal government regulated PEG practices. In 1968, the Federal Communications Commission ("FCC") initiated rule-making proceedings that ultimately led to cable regulations adopted in 1972. James N. Horwood, <u>Public, Educational, and Governmental Access on Cable Television: A Model to Assure Reasonable Access to the Information Superhighway for All People in Fulfillment of the First</u>

Amendment Guarantee of Free Speech. 25 Seton Hall L.Rev. 1413. 1414 (1995). These regulations, among other provisions, required cable operators in the largest 100 markets to set aside three channels for free use by public, educational, and governmental bodies. Cable Television Report and Order. 36 F.C.C.2d 143. 190-91, aff'd on recon., 36 F.C.C.2d 326 (1972). In introducing the regulations, the FCC stated that the "fundamental goals of a national communications structure" would be furthered with the

opening of new outlets for local expression, the promotion of diversity in television programming, the advancement of educational and instructional television, and increased informational services of local governments.

Id. at 190.

The regulations described "public" as an access channel "available without charge on a first-come, first-served nondiscriminatory basis." Id. The FCC defined "educational" as a channel that "local educational authorities" have access to for "instructional programming and other educational purposes." Id. at 191. The regulation stated that "the potential uses of the educational channel are varied. An important benefit promises to be greater community involvement in school affairs." Id. Finally, the FCC defined "governmental" as an access channel "designed to give maximum latitude for use by local governments." Id. The regulations were not long-lived, however, because the Supreme Court ultimately found them to be outside the scope of the FCC's delegated authority under the Communications Act of 1934 (which established the FCC and defined the scope of its regulatory authority). FCC v. Midwest Video Corp., 440 U.S. 689, 708-09, 99 S.Ct. 1435, 1445-46, 59 L.Ed.2d 692 (1979).

[1][2] Despite the rise and fall of federal regulations, the practice of including PEG channels in franchise agreements continued. The Cable Act, then, was intended to "recognize[] and endorse[] the preexisting practice of local franchise authorities conditioning their cable franchises on the granting of PEG channel access." Time Warner. 93 F.3d at 972. See alsoH.R.Rep. No. 98-934, supra, at 30, reprinted in 1984 U.S.C.C.A.N. at 4667. As explained by the D.C. Circuit, the PEG provisions merely ensure that states will not prohibit the practice, and preclude federal preemption challenges to such requirements. Time Warner. 93 F.3d at 972-73.

c. Legislative History of the Cable Act

While the legislative history of the Cable Act is not abundant-a House Report and few Senate floor statements-the House Report addressed many of the issues in this case. The House Report stated that one goal of the law was to "provide the widest possible diversity of information services and sources to the public, consistent with the First Amendment's goal of a robust marketplace of ideas." H.R.Rep. No. 98-934, supra, at 19, reprinted in 1984 U.S.C.C.A.N. at 4656. The House Report stated that

*1369 [c]able television offers the public an abundance of channels, with the potential to present a wide variety of perspectives from many different types of program providers. Local governments, schools systems, and community groups, for instance, will have ample opportunity to reach the public under [the Act's] grant of authority to cities to require public, educational, and governmental (PEG) access channels.

Id. The House Report noted that leased access also would promote a diversity of views. Id. at 20, reprinted in 1984 U.S.C.C.A.N. at 4657.

In a section describing the PEG provisions, the House Report noted that

[o]ne of the greatest challenges over the years in establishing communications policy has been assuring access to the electronic media by people other than the licensees or owners of those media. The development of cable television, with its abundance of channels, can provide the public and program providers the meaningful access that, up until now, has been difficult to obtain.

Id. at 30, reprinted in 1984 U.S.C.C.A.N. at 4667. The section also stated that

[a]lmost all recent franchise agreements provide for access by local governments, schools, and non-profit and community groups over [PEG] channels. Public access channels are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas. PEG channels also contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government at work.

Id. While the House Report did not expand on the three prongs of PEG, a 1991 Senate Report leading up to the 1992 amendments of the Cable Act discussed the different types of use. The Senate Report concluded that public access would allow "individuals and groups to communicate their message to the general public;" educational access would allow "local schools to supplement classroom learning and to reach out to teach those who are beyond school age or unable to attend classes;" and the governmental channel would allow "for a local 'mini-C-SPAN." S.Rep. No. 102-92, at 52-53 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1185-86.

While the PEG channels were not an innovation of the Cable Act, Congress did create a new type of access through the leased access provision. The House Report stated that leased access

complements PEG access by assuring that sufficient channels are available for commercial program suppliers with program services which compete with existing cable offerings, or which are otherwise not offered by the cable operator (for political reasons, for instance).

H.R.Rep. No. 98-934, supra, at 30, reprinted in 1984 U.S.C.C.A.N. at 4667. The House Report made clear that the key to leased access was not the commercial nature of the programming or the producer, instead it was the commercial aspect of the lease: a programmer buys space on this channel, as opposed to the free access available under PEG. The House Report stated that

"commercial use" means the provision of video programming, whether or not the third party providing the program service is a profit or nonprofit entity. The term commercial use is employed to distinguish from public access uses which are generally afforded free to the access user, whereas third party leased access envisioned by this section will result from a commercial arrangement between the cable operator and the programmer with respect to the rates, terms and conditions of the access use.

Id. at 48, reprinted in 1984 U.S.C.C.A.N. at 4685.

In addition to striking a balance between types of access for third parties-PEG and leased-the Cable Act also sought to protect the First Amendment rights of each type of user, as well as the cable operator. The House Report acknowledged that access provisions can raise First Amendment concerns, but contended that these provisions "establish*1370 a form of content-neutral structural regulation which will foster the availability of a 'diversity of

viewpoints.' "Id. at 31, reprinted in 1984 U.S.C.C.A.N. at 4668. The House Report also noted that the PEG and leased access provisions would not restrain a cable operator to a great degree since a

local cable company may provide information in which it has a financial or proprietary interest on the vast majority of its channels, as long as it sets limited channel capacity aside for use by others

Id. at 33, reprinted in 1984 U.S.C.C.A.N. at 4670. The House Report added to, and reiterated, this point: [t]he access channel requirements of [the Cable Act] are narrowly drawn structural regulations that will ensure a diversity of information sources without governmental intrusion into the content of programming carried on the cable system.

Id. at 35, reprinted in 1984 U.S.C.C.A.N. at 4672 (emphasis in original).

The House Report then addressed each constituency's concerns. Addressing PEG access, the House Report stated

it is integral to the concept of the use of PEG channels that such use be free from any editorial control or supervision by the cable operator.... There is no limitation imposed on a franchising authority's or other governmental entity's editorial control over or use of channel capacity set-aside for governmental purposes. However, the Committee does not intend that franchising authorities lease governmental channels to third parties for uses unrelated to the provision of governmental access...

Id. at 47, reprinted in 1984 U.S.C.C.A.N. at 4684.

Protecting the cable operators' First Amendment rights, the House Report stated

[w]ith regard to the access requirement, cable operators act as a conduit. They do not exercise their editorial discretion over the programming; nor are they prevented or chilled in any way from presenting their own views and programming on the vast majority of channels otherwise available to them.

Id. at 35 reprinted in 1984 U.S.C.C.A.N. at 4672.

Later statements by Congress also evidence an intent to

curb franchising authorities' control over cable operators. In the 1992 amendments to the Cable Act, Congress found that "[t]he Cable Communications Policy Act of 1984, in its amendments to the Communications Act of 1934, limited the regulatory authority of franchising authorities over cable operators." Cable Television Consumer Protection and Competition Act of 1992, Pub.L. No. 102-385. § 2(a)(20), 106 Stat. 1460, 1463 (1992) ("1992 Act").

2. Post-1984 Cable Act Legislation

The cable industry grew dramatically after the 1984 Cable Act. Congress conducted a two-year study of the expanding industry which ultimately led to the passage of the 1992 Act. <u>Time Warner</u>, 93 F.3d at 963. The 1992 Act revised some provisions of the 1984 Cable Act, left others intact, and added still others. In response to congressional studies that concluded cable rates were excessive due to a lack of competition, the 1992 Act granted the FCC and local authorities the power to regulate prices. Primarily, the 1992 Act imposed rate regulations on the industry and required operators to carry television broadcast stations.

While the 1992 Act did not amend the 1984 Cable Act PEG provisions, it did add several provisions related to PEG. First, it required that cable operators provide a basic tier service, a set of channels that include PEG channels. 47 U.S.C. § 543(b)(7)(A)(ii). Second, it allowed franchise authorities to require cable operators to provide "adequate assurance that the cable operator will provide adequate public, education, and governmental access channel capacity, facilities, or financial support." 47 U.S.C. § 541(a)(4). Finally, the 1992 Act enacted censorship provisions for indecent programming on PEG channels. 47 U.S.C. §§ 532(h), (j), and note following § 531. This was a major change from previous law which prohibited cable operators from exercising any editorial control over PEG channels. The Supreme Court recently struck down the censorship provisions on First Amendment grounds. *1371 <u>Denver Area Educ. Telecomm. Consortium v.</u> FCC. 518 U.S. 727. ---. 116 S.Ct. 2374, 2394, 135 L.Ed.2d 888 (1996).

The 1992 Act also made changes to the leased access provision. Section 612 of the Act notes that leased access is rarely used. While the reasons for this are uncertain, <u>Time Warner 93 F.3d at 968-69</u>, the Senate Commerce, Science, and Transportation Committee attributed the lack of use to the fact that cable operators could set the terms and rates of the leases. Sen.R. No. 102-92, *supra*, at 30-

32, reprinted in 1992 U.S.C.C.A.N. at 1163-65. The 1992 Act allows the FCC to establish maximum rates for leased access and regulate the terms and conditions of such leases. 47 U.S.C. § 532(c)(4)(A). The 1992 Act also adds to 47 U.S.C. § 532 (the leased access provision) by providing that a cable operator may designate leased access channels for qualified minority or educational programming. The 1992 Act defines educational programming as "programming that promotes public understanding of mathematics, the sciences, the humanities, and the arts." 47 U.S.C. § 532(i)(3).

One study that informed the 1992 Act discussed the importance of localism "as a fundamental policy in domestic broadcasting." Dep't of Commerce, Nat'l Telecomm. & Info.Admin., Comprehensive Study on the Globalization of Mass Media Firms. 55 Fed.Reg. 5792, 5800 (Feb. 16, 1990). It stated that

[w]hile this federal policy of "localism" is principally a part of broadcast regulation, cable television systems often have local programming requirements imposed on them pursuant to state or local franchises. The [Cable] Act authorized local franchising authorities to insert public, educational, or governmental access channel requirements in cable television franchises. Many local authorities have opted to establish such requirements. These access channels often provide programming to cable subscribers with a uniquely local orientation.

Id. at 5801 (footnote omitted).

Most recently, Congress enacted the Telecommunications Act of 1996 ("1996 Act"), Pub.L. No. 104-104, 110 Stat. 56, which deregulates the cable industry, phasing out by March 31, 1999, the rate requirements imposed by the 1992 Act. 47 U.S.C. § 543(c)(3). In legislative debates leading up to the 1996 Act, a 1994 Senate committee report stated that PEG channels play an important role in cable services. It noted that

[e]xisting telecommunication technologies have already permitted the development of diverse community-based programming that has increased civic discourse and expanded access and services to informational, cultural, educational, and health related services. For instance, community use of public, educational, and governmental (PEG) access channels on cable systems has become a vital means of maintaining an informed and involved citizenry. Community use of PEG access channels has increased dramatically over the past 20 years. Over 20,000

hours of new programs are now produced each week, totalling over 1 million hours of new programs per year. This is greater than ABC, CBS, NBC, and PBS combined.

S.Rep. No. 103-367, 103d Cong., 2d Sess. 15 (1994).

3. Other Uses of "Educational" in Telecommunications Law

Wireless cable systems, which transmit television signals over microwave bands and are only accessible to persons with specialized antennas and converters, do not fall within the ambit of the cable regulatory scheme. The FCC does, however, grant licenses for Instructional Television Fixed Service (ITFS) stations for use on these systems. These stations provide "educational, instructional, and cultural material to students participating in training programs and other educational television systems." 47 C.F.R. § 74.931(a)-(d) (1993). Only educational institutions and nonprofit organizations with educational purposes are eligible for ITFS licenses. *Id.* § 74.932.

B. "Public," "Educational," and "Governmental" in Practice: Nationally and in New York City

1. PEG Nationally

While PEG use varies somewhat around the country, typically, the channels are used *1372 for similar purposes and in similar ways ENII Public channels are available to individuals and community groups on a first-come, first-served basis. Wally Mueller, Controversial Programming on Cable Television's Public Access Channels: The Limits of Government Response. 38 DePaul L.Rev. 1051, 1060 (1989). These individuals or groups are producers, directors, writers, and actors. Robert S. Oringel & Sue M. Buske, The Access Manager's Handbook: A Guide for Managing Community Television 10-11 (1987). This results in eclectic programming limited only by the users' imagination and innovation.

FN11. This "typical use" is reflected in a pre-Cable Act case where a United States District Court in Rhode Island discussed a franchise agreement that required the operator to provide PEG channels. The court defined "public" as those channels "available for use by members of the general public on a first-come, first-served nondiscriminatory basis"; "educational" as channels "available for use by local educational authorities and institutions (including but not limited to school departments, colleges and universities but excluding commercial educational enterprises)"; and "government" as channels "available for use by municipal and state government." <u>Berkshire Cablevision of Rhode Island v. Burke</u>, 571 F.Supp. 976. 980 (D.R.I.1983), vacated as moot, 773 F.2d 382 (1st Cir.1985).

FN12. The assertions contained in this book were largely confirmed by the information the parties gave this Court at the preliminary injunction hearing.

Educational institutions use the educational channels to extend classrooms into individual homes, reaching those who might not otherwise be able to attend classes. The channels are also used by educational institutions to disseminate news and information about school events. For instance, programming may inform the community about school news, update teacher training, publicize the school lunch menu, relay athletic event information, and provide instructional programming. *Id.* at 8, 11, 93. Municipalities use their governmental channels to disseminate information about governmental activities and to cover local government proceedings. *Id.* at 114.

There is some variation in the use of governmental and educational channels. For example, Aurora, a Denver suburb, airs local news on its governmental channel, many cities air programming for the disabled, and still others air foreign-language programming. These uses, however, arise from a determination that commercial television neglects the needs of certain audiences. The Aurora experience is instructive. In that case, the Aurora City Council decided that local news, which originates in Denver, did not adequately meet the needs of Aurora residents. Therefore, Aurora carries local news programming that does cover news from its community. Other cities reached similar conclusions about the need for foreignlanguage programming and programming focused on the needs of the disabled community. Although some of these programs contain commercials, to the knowledge of this Court, no city uses its PEG channels to compete with regular commercial channels. Rather, PEG programming that varies from a more traditional use stems from a desire to serve those communities that are not otherwise served, not a desire to enter the commercial fray of cable programming.

2. The History of Educational and Governmental Chan-

nels in New York City, FN13

FN13. Although the Court asked the parties on October 15, 1996 to provide it with as much information as possible regarding the historical and current use of PEG channels in New York City (and across the country), the City did not submit any information regarding the use of the City's PEG channels on October 23, 1996, the day the evidence in chief was submitted by each party.

New York City broke the path for PEG access, negotiating for municipal channels almost since the beginning of cable services in the City. Cable franchises awarded in 1970 provided for two "City Channels." See, e.g., Contract Between City of New York and Sterling Information Services, Ltd. (Aug. 18, 1970) at §§ 1(n), 4(b). Amendments to these franchise agreements four years later increased the number of City Channels to four. See, e.g., Contract Between City of New York and Teleprompter Corp. (Feb. 28, 1974) at 5. Only two of the channels were used-one for educational programming and the other for *1373 governmental programming such as the broadcasting of City Council meetings. By the early 1980s, the government channel had become "a forum for City officials, municipal agencies, non-profit organizations and community boards to speak directly to New York citizens." Manhattan Cable TV, Community Programming Handbook 7 (1982). The types of programs run on the government channel included "East Side Report" hosted by two assemblymen, "Community Board 3," and "Social Security and You," a call-in program where callers posed and received answers to their questions about social security. See id. at 7. In the late 1980s the location of the channel was relocated (from Channel L to Channel 25), but the use remained the same, offering such programs as call-in shows where participants debated policy issues with public officials. Id.

3. Current Use of Educational and Governmental Channels: Crosswalks

In February 1992, the City launched Crosswalks. This network is owned and operated by the City of New York and is administered by DoITT. The network operates five channels (numbers 71-75) which are available to all cable subscribers. Crosswalks reaches four million viewers in 1.4 million households. When the City launched the network, the Commissioner of the Department of Telecommunications and Energy ("DTE"), William F. Squadron, stated that the goal of Crosswalks was to "use the cable

technology to bring educational, governmental, and public information to the people," William F. Squadron, New York City's Cable Television Network: Statement by the Commissioner. He said Crosswalks would have

programs devoted to enhancing the quality of life for young people and for senior citizens. It will have job training shows and employment listings. It will offer public safety tips on subjects like crime and fire prevention. It will provide health information to help people identify and respond to illness. It will display a bulletin board of government, educational, and cultural activities throughout New York. And, in time, it will cablecast the proceedings of the City Council and the City Planning Commission.

Id He stated that Crosswalks was "not a commercial enterprise" and viewers "should not expect glossy network productions." Id. Another stated goal was to "realize the potential of [cable] to improve communication between government and the public." Id.

The initial 1992 Programming Policy and Operational Procedures for Crosswalks identified the goals of Crosswalks: to (1) "enhance public awareness and understanding of the structure and functions of City government services, resources, and activities"; (2) "increase access to City government for the City's residential and business communities"; (3) "provide various educational services to the City's diverse communities"; and (4) "disseminate information about the services and programs provided by City agencies and other government offices." Crosswalks Television Network, Dep't of Telecomm. & Energy, Programming Policy & Operational Procedures 1 (1992).

Crosswalks' 1995 Policies and Procedures manual states that Crosswalks produces its own programs and coproduces programs with other government agencies. The guidelines state that programs may come from nongovernmental agencies but only if "endorsed by a government agency and in connection with programs containing subject matter directly or indirectly related to the functions of such agency." Crosswalks Television Network, Dep't of Info.Tech. & Telecomm., Policies and Procedures 9 (1995).

When first launched, the DTE said that each of the five Crosswalks channels would have a distinct character. The different identities would be (1) public interest-consumeroriented information about government requirements such as building permits; cultural programs; and public safety;

(2) government in action-government proceedings such as City Council and City Planning Commission; (3) adult education and training-offering basic adult education, English language classes, and a bulletin board for jobs and training programs; (4) youth-programming by and for children; and (5) health, science, and the environment-programs about community and personal health, and alternative energy sources.

*1374 Current Crosswalks programming mirrors these categories. A June 1, 1995 DoITT manual for Crosswalks describes the programming on the five Crosswalks channels. For example, Channel 71 shows Off-Track Betting ("OTB") and program listings. Channel 72, called the "Opportunity Channel," airs educational and employment-oriented programs such as English and Spanish GED classes, other basic skills programs, and job listings. Channel 73 lists announcements of government services, hotline numbers, cultural and educational activities around the City, and a number of ethnic programs. Channel 74 is called "A Window Into Government." Among other things, it telecasts City Council meetings, programs about health and safety, taxes, and senior citizens. Channel 75 is known as "CUNY-TV" and is funded and operated by the City University of New York. It carries educational programming such as "Multiculturalism: Cross Cultural Communication"; "Algebra: Exponents and Radicals"; and "The Chinese: Overview of Chinese History."

Channel 74, the "Window Into Government," is of particular importance to this case. As one of the proposed homes for Fox News, Channel 74 has several self-proclaimed goals: (1) to "serve as a window into the workings of government"; (2) to serve as a medium for expression and debate of public issues"; (3) to "give prominence to information, ideas and viewpoints that might not otherwise be seen or heard"; and (4) to "build constituency support and recognition among city officials, community groups and the public at large."

DoITT's 1995 annual report touts Crosswalks' achievements. It notes that

[f]or over three years, Crosswalks has been enhancing public awareness of government activities and services via non-commercial, non-partisan, municipal programming, while providing literacy and employment training for adults.

Dep't of Info. Tech. & Telecomm., Annual Report FY

1995, at 29. Crosswalks' Mission Statement describes its mission as one to "provide educational programming and to enhance public awareness of government activities and services through its five basic cable channels via strictly non-commercial and non-partisan television."

Crosswalks did not air commercial programming until July 1996. At that time the City asked Time Warner for permission to use a government channel for advertiser-supported foreign language and ethnic programming. These programs had lost their space on WNYC, a public television station, when the City sold that station. At the City's request, Time Warner agreed to waive its right to block such programming.

C. Time Warner's New York Cable Systems

Time Warner runs two cable systems in New York City, with 77 channels in Manhattan, and 76 in the outer boroughs. On both systems, nine stations are set aside for PEG use and eleven for leased access. In addition, the Manhattan and Staten Island systems air fifteen local broadcast stations, pursuant to the federal must-carry law, FNI4 and the Brooklyn and Queens systems air fourteen such stations. Therefore, Time Warner has programming control over forty-one to forty-three stations, depending on the borough. Of the nine PEG channels in Manhattan, four are designated for public access use and are administered by the Manhattan Neighborhood Network, a non-profit entity independent of the City. These stations are not at issue in this controversy. The remaining five channels represent the "EG" in PEG and are administered by a City agency.

FN14. Qualifying local television stations may choose between two types of access to a cable system. They may either elect for carriage under the "must-carry" provision of the 1992 Act which does not require a contract, or they may negotiate a contract for carriage under a "retransmission consent." See47 U.S.C. § 534(b); 47 C.F.R. § 76.64 (1995). Of the fifteen local television stations carried on Time Warner in Manhattan and Staten Island, nine are carried pursuant to the must-carry provision and six pursuant to retransmission consent contracts. On the Brooklyn and Queens systems, eight stations are carried pursuant to must-carry and six pursuant to retransmission consent contracts.

*1375 D. Franchise Agreements Between Time Warner

and the City Regarding PEG

There are two franchise agreements relevant to this case, both of which are still in effect: a 1983 franchise agreement ("1983 Agreement") between New York City and Time Warner for the provision of cable services in Brooklyn, Queens, and Staten Island, and a 1990 franchise agreement ("1990 Agreement") between the City and Time Warner to provide cable services to northern and southern Manhattan.

Both agreements provide for PEG channels. The 1983 Agreement states that the "Municipal Channels" will be used "for the purpose of distributing noncommercial services by the City or for any other lawful governmental purpose." 1983 Agreement § 4.1.03. The 1990 Agreement states that the "Governmental Channels" will be

used for distributing Services by the City or educational institutions for functions or projects related to governmental or educational purposes, including the generation of revenues by activities reasonably related to such uses and purposes.

1990 Agreement § 4.1.04. Both agreements state that the parties cannot amend the agreements except in writing. 1983 Agreement § 20.3; 1990 Agreement § 16.22. Both agreements also contain merger clauses. 1983 Agreement § 20.3; 1990 Agreement § 16.4.

The differences in language between the agreements regarding the PEG stations has generated much discussion. The City maintains that the omission of the word "noncommercial" in the 1990 Agreement entitles it to place commercial programs on the channels. Time Warner uses parol evidence to demonstrate the parties' intent in the 1990 Agreement. When negotiating the 1990 Agreement, the City proposed language regarding the "use of Governmental Channels" that would have opened the door for commercial programming. The proposed language read

[t]he Governmental Channels shall be placed under the jurisdiction of the Mayor and used for any lawful purpose including, without limitation, any revenue generating use.

Time Warner rejected this language and proposed that the provision be consistent with the 1983 Agreement Time Warner also submitted written comments responding to the City's proposal and explaining Time Warner's proposed changes. In these comments, Time Warner stated

that the provision had been "[m]odified to conform more closely to the [1983 Agreement].... In particular, such channels should not be used for commercial purposes." Time Warner took this position because it believed non-commercial programming was mandated by the law. The City's lawyers, including its cable expert Norman Sinel, an author of a treatise on cable law, also took the position that noncommercial programming on PEG stations was mandated by the law. Both parties thus agreed that any commercial programming would be unlawful. The final version of the 1990 Agreement does not mention whether the channels may be used for commercial purposes, or are restricted to noncommercial purposes, but does limit the use of the channels to "governmental or educational purposes." 1990 Agreement § 4.1.04.

The City never aired commercial programming on the PEG channels under either agreement until July 1996. Between the signing of the 1990 Agreement and this dispute, the City has refused to air at least two programs with a strong public interest character specifically because of their commercial nature. First, in early 1995, GEMS, a Spanish-language cable programming network which offered educational, cultural and entertainment programming that emphasized Latina issues, was rejected for carriage on Crosswalks because GEMS was an advertiser-supported program.

Second, in 1995, Kaleidoscope Network, Inc., a for-profit cable programmer that provided programs by, for, and about the disabled community, met with the City about placing its programs on Crosswalks. In these meetings the general manager of Crosswalks expressed concern about Kaleidoscope's commercial nature, in particular that the network aired commercials and was a for-profit entity. The City apparently never made a final decision on whether to carry *1376 the Kaleidoscope network, but there have been no recent discussions.

In support of its position, the City cites a number of examples of commercial programming prior to October 1996. For example, the City refers to the airing of Off-Track Betting programming. This program was designed to generate revenue for the City by promoting betting through the OTB. Moreover, it was carried with Time Warner's express consent. The City also refers to a promotional program provided by Microsoft that gave instructions on the usage of Microsoft products, with the incidental effect of promoting those products. I find the difference between such programming and the programming at issue here too great to place any weight on the

prior action of the City in these circumstances or to change my conclusion that the City believed the franchise agreements prevented commercial programming, including Fox News.

E. Facts Underlying the Current Dispute

1. Time Warner's Merger and Application to the City in Connection with the Merger

On September 22, 1995, the Board of Directors of Time Warner Inc., the corporate parent of the franchisees, and the Board of Directors of Turner Broadcasting System, Inc. ("Turner") approved the terms of an agreement providing for a merger involving the two companies.

On May 30, 1996, Richard Aurelio, the President of Time Warner's New York City Cable Group, wrote to inform DoITT of the merger and Time Warner's view that the transaction involved no change of control of the franchisees or Time Warner, and, therefore, required no action on the City's part. Under Time Warner's franchise agreements with the City, Time Warner must seek the City's approval of any change of control, which is defined as "actual working control," of the franchisees or their franchises. There is a rebuttable presumption that a change in ownership exceeding five percent of a franchisee constitutes a change in control. The franchise agreements also prohibit anticompetitive behavior, and allow the City to investigate and rectify such a situation. 1983 Agreement §§ 3.8.01-02; 1990 Agreement §§ 3.8.01-07. Over the years, the City has taken the position that a restructuring constitutes a change of control, but has in each instance approved the change provided the franchisees agreed to certain conditions.

At a meeting on July 8, 1996, DoITT asked Time Warner to submit a formal petition requesting a ruling from the City that the merger did not constitute a change of control. In response, Time Warner submitted such a petition on July 22, 1996. The petition requested the City to act by the end of August since the parties anticipated closing the transaction in September. The petition revealed that a change of ownership of five percent or more of Time Warner was being proposed, but argued that because the current franchisees and their existing management would remain in control of the franchises, and the actual working control of the franchisees would remain unchanged, that the change in ownership did not result in any change of control for purposes of the franchise agreements. The petition set out in detail the terms of the proposed transac-

tion, including the fact that Ted Turner, the President and Chairman of Turner Broadcasting, was expected to receive approximately 11.3% of the shares of Time Warner, representing approximately eleven percent of the voting power; that he would be elected to the Time Warner Board of Directors as Vice-Chair, and would be permitted to nominate one additional director to the fifteen-member board. Ten of the fifteen board members would continue to be unaffiliated, outside directors.

On July 30, 1996, DoITT's Assistant Commissioner Salvador Uy wrote that the City believed that the proposed transaction did involve a change in control requiring City approval. However, based on the review done so far, DoITT believed that it "may be possible for DoITT to recommend approval of the merger to the City's Franchise and Concession Review Committee" ("FCRC") FNIS+1377 and that the City would do everything possible to accommodate Time Warner's stated time frames. DoITT committed to work towards a schedule that would permit it to make a presentation to FCRC at its September meeting. It asked to see the final agreement Time Warner had negotiated with the Federal Trade Commission ("FTC") and a draft of the proxy statement that would be distributed to the shareholders.

FN15. The FCRC consists of the Mayor or his designee, who acts as its chair; the Director of the Office of Management and Budget; the Corporation Counsel; the Comptroller; an additional person appointed by the Mayor; and the borough president of the borough in which the franchise under review is located. Any approval of a resolution regarding a franchise requires an affirmative vote of at least four members; if more than one borough is involved, the borough presidents jointly may exercise one vote.

2. DoITT and Time Warner Worked Together in the Ensuing Weeks.

At a meeting on August 16, 1996, Time Warner and its counsel gave DoITT a detailed explanation of the merger and responded to DoITT's questions. This meeting was attended by, among others, the City's outside counsel and expert on cable matters, Norman Sinel. There was no discussion about the diversity of programming on Time Warner. On August 20, Uy prepared a draft memorandum to the FCRC requesting approval of the merger. The draft memorandum requested that a public hearing be held by the FCRC on September 9, 1996 and that the Committee

consider an attached proposed resolution at its meeting of September 11, 1996. The proposed resolution approved the merger, provided that executed copies of merger documents that had been seen in draft were submitted and that the franchisees pay the costs of the review of the petition. As was customary, DolTT sent the draft memorandum and proposed resolution to Time Warner and thereafter assured Time Warner that its requested changes would be incorporated into the final resolutions.

Due to a delay in the FTC approval process, the merger was not placed on the FCRC's September 11 agenda. On September 12, 1996, Time Warner announced that the FTC had approved Time Warner's merger with Turner. Time Warner immediately advised the City that the closing date for the merger was set for October 10. DoITT assured Time Warner on several occasions that there should be no difficulty in approving the merger before the October 10 closing date. DoITT's review process for the merger was essentially completed by mid-September.

On October 1, 1996, after a meeting described in some detail below, DoITT's General Counsel Elaine Reiss called Aurelio to discuss preparations for the October 9 FCRC meeting, at which it was expected that the merger would be approved. That day she sent Aurelio a draft of the resolution and memorandum that DoITT planned to send to the FCRC. The memorandum requested a public hearing on October 7 and Committee approval on October 9. The proposed resolution was substantially unchanged from the August 20 draft. Reiss also enclosed a memorandum with a list of the remaining outstanding issues, which would be discussed with Time Warner at a meeting on October 3. None of those issues related to Fox News or any other news programming. Through this time, there had been no mention of any news programming issue or Fox News in the discussions between DoITT and Time Warner concerning the FCRC approval of the merger.

At a meeting on October 3 between DoITT and Time Warner, all but three of the outstanding issues were resolved. After the remaining issues were resolved in a telephone conversation between Reiss and Aurelio later that day, it appeared that there were no other obstacles that would prevent FCRC approval of the merger. At about this time, when Aurelio raised with Uy the need for a special meeting of the FCRC to approve the merger, Uy assured Aurelio that a special meeting was unnecessary and that everything was proceeding on track.

3. Time Warner's Choice of MSNBC

As a prerequisite to approving the merger, the FTC issued a consent decree that required Time Warner to carry on cable systems serving a specified number of subscribers one additional 24-hour news channel unaffiliated with either Time Warner or Turner. The consent decree did not require *1378 that a new news service be carried in New York City, but only that one be made available to fifty percent of Time Warner subscribers across the nation by July 2001. In anticipation that the consent decree would contain a provision of this nature, Time Warner had already entered into negotiations with Fox News and MSNBC, a joint venture between Microsoft and NBC, each of which had announced an intention to launch a full-time, all-news cable programming network. Bloomberg, another news provider, also approached Time Warner about carriage pursuant to the consent decree.

Fox News is ultimately owned by Rupert Murdoch, the CEO of News Corporation, a multinational network of companies. Murdoch's holdings in New York City include *The New York Post* and WNYW-Channel 5. Murdoch also owns the Fox Broadcast Network. In Great Britain he owns, among other things, *The Times, The Sun* and SkyTV. In Australia he owns newspapers and a national television network.

Fox News is a 24-hour news channel that was launched on October 7, 1996, and was described at that time as being available to 17 million cable television subscribers. In June 1996, the City and News America Publishing, the parent company of the Fox News Channel, had concluded negotiations which, according to the City, provide for the retention of 2,212 jobs and the creation of a projected 1,475 jobs. As part of the agreement, new studios for Fox News were to be located in midtown Manhattan. The City reports that it is projected that over 513 of the new jobs attributable to News America would be created through the operation of the Fox News channel.

MSNBC planned to convert an existing cable programming service, the America's Talking service, to an allnews format. America's Talking was already being distributed to approximately 20 million cable subscribers, of whom about 3 million were Time Warner subscribers.

Bloomberg operates a television news service that was created from the services provided by the Bloomberg terminal, a desktop provider of financial news and information. A ticker tape of current market and financial information important to investors appears on the television

screen at all times during Bloomberg television programming.

Bloomberg provides 24-hour news programming to approximately 2.5 million subscribers through direct to home satellite service. Approximately 10 million additional cable television subscribers receive Bloomberg coverage on a part-time basis. Bloomberg also has affiliation agreements with commercial independent television broadcast stations, which permit it to reach about 47 million households. Bloomberg seeks distribution on commercial channels and to raise revenue through the sale of advertising and subscriber payments. In New York City, Bloomberg is carried 24 hours a day on a Time Warner commercial network sold to hotels, restaurants and office buildings. Bloomberg has also provided twenty daily sixminute customized regional reports for Time Warner's cable systems in New York City. Bloomberg sells up to 90 seconds of advertising during each of these six-minute segments. When BIT was shown on the Crosswalks channel, it was these six minute segments that were inserted to fill the fourteen minutes per hour in which advertising is normally seen.

Time Warner did not consider BIT a serious contender to satisfy the requirements of the FTC consent decree. In contrast, MSNBC and Fox News were each viable candidates. From Time Warner's perspective, MSNBC presented several advantages over Fox News. First, NBC had a reputation in the delivery of news built over decades of work in the field, while Fox had no established national television news organization. Second, conversion of America's Talking would give MSNBC immediate access to all of those subscribers without the need to enter into new contracts with cable operators. Third, an agreement with MSNBC resolved several outstanding commercial disputes between NBC and Time Warner without the need for litigation.

A principal disadvantage of choosing Fox News was that Fox wanted immediate carriage on substantially all of Time Warner's *1379 systems, which, because of channel capacity limitations in many of those systems, would have required deletion of other programming services. Time Warner was reluctant to delete programming because of, among other things, concerns about the reaction of viewers who are loyal to programming that is displaced. Time Warner wanted a slower and smaller roll-out for Fox News.

On July 15, 1996, NBC converted America's Talking to

MSNBC and Time Warner carried MSNBC on the channels that had been showing America's Talking despite the fact that they had not reached any agreement to do so. By the end of August 1996, Time Warner informed Fox that it did not want to continue negotiations until after satisfactory conclusion of the FTC process. At that point in time, Time Warner and Fox were close to reaching an agreement, but still had to resolve some important issues, such as an assurance from Fox that its programming on its news network and its broadcast network would not be duplicative.

On September 17, Time Warner notified Rupert Murdoch, Fox's CEO, that it had chosen MSNBC over Fox.

The addition of MSNBC to the New York City cable system meant that Time Warner now carried eight full-time cable news channels, which, when combined with the news programs provided by the broadcast networks and other cable networks, provide more than 350 hours of news and information programming to New York City cable subscribers each day.

In addition to BIT and Fox News, approximately thirty programmers have sought unsuccessfully to be carried full time on Time Warner's cable systems in New York City. They include: The Independent Film Channel, Sports Illustrated/CNN, America's Health Network, TV Land, Turner Classic Movies, ESPN 3, The Travel Channel, and Mind Extension University. Some of these thirty services are run by New York City based companies such as Viacom, CBS/Westinghouse, Capital Cities/ABC, and Hearst.

4. The City's Reaction to Time Warner's Rejection of Fox

On September 20, 1996, three days after Murdoch learned of the Time Warner decision to conclude an agreement with MSNBC, the Mayor called Deputy Mayor Reiter and reported that Roger Ailes (the President of Fox and a former media advisor to the Mayor) had called to say that Fox had run into a problem getting onto the Time Warner cable system in New York City. The Mayor said the situation "was very serious" and asked Reiter to investigate.

On September 26, Reiter and Corporation Counsel Paul Crotty met with Fox representatives and were told that Fox viewed the issue as an antitrust problem. At Crotty's invitation, Fox outlined its antitrust theory in a letter to Reiter dated September 27. The letter indicated that "carriage of Fox News Channel on New York City's cable

systems was required to assure the necessary financial and advertising success and audience demographics of the Channel" (emphasis supplied). The letter represented that Time Warner's decision put Fox News Channel in danger of failing in this commercial endeavor. Fox indicated that it was considering filing comments with the FTC opposing the merger as anticompetitive, filing a law-suit against Time Warner for violations of the antitrust laws, and submitting a petition to the City that the FCRC not approve the merger.

In response to the Mayor's request and the information she had learned from Fox, Reiter, in conjunction with her staff and counsel, conceived of the idea of using Crosswalks as a way to obtain access for Fox News to the New York City cable system. She understood that the shortage of capacity on Time Warner's system was responsible, at least in part, for its decision to not give Fox News a channel. On September 29, Reiter spoke with Time Warner's Derek Johnson to request a meeting with either Richard Parsons (President of Time Warner) or Gerald Levin (Chairman of Time Warner), prior to the October 7 FCRC public hearing on the merger, so that the City could discuss its concerns about Time Warner's decision not to carry Fox News. Johnson's internal memorandum to his colleagues regarding this telephone call notes that the proposal *1380 "[a]lthough attractive ... could spark grave reaction from programmers and politicians alike."

The critical meeting in this series of events was held on October 1, 1996, in Reiter's office. Attending the meeting on behalf of the City were Deputy Mayor Reiter, her chief of staff David Klasfeld, a Special Assistant to Reiter and her designee as Chair of the FCRC Craig Muraskin, Assistant Corporation counsel Bruce Regal, outside counsel for the City Norman Sinel, and the General Counsel of DoITT Elaine Reiss. Robert Jacobs, General Counsel of Time Warner's New York City Cable Group, and Allan Arffa, outside counsel for Time Warner, accompanied Aurelio to the meeting. Most of the persons attending the meeting have put in affidavits and been deposed.

The purpose of the meeting was to convey the City's request that Time Warner agree to carry the Fox News Channel on Time Warner's commercial channels. Reiter indicated that the City wanted this issue resolved before the FCRC meeting to approve the merger. When Aurelio raised the issue of the legal prohibitions against the City's involvement with the content of cable programming on the commercial stations, Reiter asked Regal to describe the City's proposal in detail.

The proposal was that the City would allow Time Warner to move what the City termed an "educational" programciting the Discovery Channel or the History Channel as examples-onto a Crosswalks channel, creating a vacated channel for Fox News on Time Warner's commercial system. Because of concern over the First Amendment issues that this proposal triggered, the City proposed a way to structure the transaction. Regal said that the parties could "paper the deal" to make it appear as if there were no guid pro quo, with "simultaneous closings" for the City's agreement to give up a municipal channel and Time Warner's agreement to carry Fox News. As Reiter has explained in her direct testimony, the City did not want to be in the position of having agreed to carry another channel and then learn that Time Warner had no intention of using the freed channel for Fox News.

Time Warner responded that the proposal was unacceptable; Arffa, outside counsel for Time Warner, described provisions of the Cable Act and its legislative history which prohibit the City from requiring specific programming to be carried by a cable operator. Sinel, outside counsel for the City and an authority on the Cable Act, indicated that the City was fully aware of the "risks" of the proposal and did not need a lecture about the law. As far as the City was concerned, the issue was whether Time Warner was as prepared to run the risks as the City was. The meeting quickly ended after Time Warner pointed out that there were other programmers who wanted to be placed on the commercial channels, many of them also based in New York, who would not be getting the special preference that the City was suggesting for Fox News. Aurelio had indicated during the meeting that the reason that Fox News and Time Warner had not reached an agreement was not simply capacity, since that was always a problem, but that there had been a failure to arrive at a business arrangement, and, although Time Warner was willing to resume negotiations, Fox had walked away.

In a telephone call he placed on the evening of October 1, Richard Parsons told Reiter that he thought the City's intercession on behalf of Fox News was inappropriate, but that he hoped that Time Warner and the City could avoid a head-on collision. In response to Reiter's indication that she understood Time Warner was willing to continue its negotiations with Fox News, Parsons indicated that Time Warner was not ready to renew those discussions until after the merger on October 10.

Reiter described the meeting earlier in the day as very unpleasant and unnecessary since the City recognized Time Warner's right to refuse to grant a waiver to allow Fox News to be placed on Crosswalks. In order to resolve the entire problem, she urged Parsons to have Time Warner's Levin call Murdoch and promise to meet soon with the goal of getting Fox News on the New York cable system. She argued that Fox News had to be put on the cable system so that 600 jobs could be saved. Parsons pointed out *1381 that those jobs were assured since Fox News already anticipated a successful launch of its channel. Reiter then indicated that she would be sending a letter with a new idea that would permit Fox News to be put on Crosswalks with a waiver from Time Warner. When Parsons indicated that any resolution of the issue would have to follow the October 10 closing of the merger, Reiter pointed out that Fox News was going to raise the issue of its exclusion from a Time Warner channel in New York City at the FCRC public hearing and that that would be a problem for Time Warner. She also stated that the franchises were up for renewal in 1998 and Time Warner would not want the Fox News Channel issue to cloud the renewal decision.

On October 2, 1996, Reiter wrote to Time Warner requesting that Time Warner agree to a "waiver" to permit the City to place Fox News on Crosswalks. The City acknowledged that the franchise agreements provide for the use of Crosswalks "for governmental purposes." She identified those governmental purposes as responding to Fox's claim that it could no longer guarantee the creation of the new jobs it projected from the development of Fox News without a cable channel in New York City and the City's desire to have a diversity of news available to New Yorkers. The letter noted that Fox News would have to carry commercials in order to insure its fiscal viability. The letter ended with the statement:

The City is fully aware of the first amendment and Federal law restrictions on its authority to regulate content on cable television systems. Nothing in this letter is intended in any way to be, and should not be construed as being, inconsistent with Time Warner's rights under the Constitution and Federal law.

On October 3, the Mayor requested a meeting to be held at Gracie Mansion on the current status of negotiations on the Fox News issue and the status of the Time Warner petition for approval of the merger. Reiter, Regal, Crotty, Muraskin, Klasfeld, Deputy Mayor Mastro, Sinel, and Reiss attended the meeting. Reiter told the Mayor that she

was waiting for Time Warner's response to her new request for a waiver.

On October 3, Time Warner wrote to Reiter and rejected the request for a waiver.

5. The Aftermath of Time Warner's Refusal to Carry Fox News

As described above, at a meeting on October 3, 1996 between Time Warner and DoITT concerning the FCRC approval of the merger, there was no mention of Fox News or any specific programming matters. DoITT continued to convey that it would be recommending to the FCRC that the merger should be approved. It quickly became clear though that the City would hold the merger approval hostage to Time Warner agreeing to carry Fox News on a cable channel.

On October 3, Sinel called Arffa and told him for the first time that the City might raise antitrust issues in connection with the merger. On October 4, Klasfeld wrote Time Warner's Parsons and urged him to reconsider the rejection of the City's request that it waive its objection to Fox News being placed on Crosswalks through an appeal to Time Warner's "good corporate citizenship." Again, the City justified the waiver on grounds that it would help Fox News create 1,475 new jobs and enhance competition in news programming. The City cited as a precedent the waiver that had allowed ethnic programming formerly carried on WNYC-TV, a City-owned station, to continue on Crosswalks after WNYC-TV was sold.

On October 7, Time Warner refused to relent, contending that it was inappropriate for commercial programming like Fox News to be carried on a PEG channel. Time Warner responded to the appeal that it be a good corporate citizen by citing the many efforts it had made to be one, including its commitment to the City's economic revitalization. Time Warner indicated, however, that the City's effort to get its consent on the eve of the FCRC hearing was inappropriate and created the impression that the City was using its regulatory leverage to influence Time Warner's programming decisionmaking. As Time Warner explained, it had received more than thirty requests from cable programmers for carriage in New York City prior to receiving the Fox News request, and *1382 many of these services were also based in New York City.

On that same day the Mayor received a letter from Bloomberg which offered to furnish BIT, stripped of its

commercials, for carriage on Crosswalks. Also on October 7, the public hearing regarding the merger was held before the FCRC. A transcript of that hearing was received in evidence. Suffice it to say that Fox News objected to the FCRC approving the merger.

On October 8, Klasfeld told Muraskin that the FCRC should not act on Time Warner's petition at the October 9 meeting Consequently, at the October 9 meeting of the FCRC. Muraskin read a lengthy statement from the Mayor, which indicated that the City had not yet had enough time to consider the merger issue and therefore consideration of the merger was deferred. Several of the facts described in the statement are at odds with the record developed for this hearing. In response to questions from those members of the FCRC who are not the Mayor's representatives, Muraskin indicated that DoITT itself had never been prepared to recommend the merger and that nothing had changed in DoITT's mind between October 2 and 9 except that additional questions prevented such a recommendation. That statement is not consistent with the evidence presented at the hearing. DoITT had received the information it requested from Time Warner, had satisfied itself that there was no obstacle to approval of the merger, and had been prepared to recommend approval until instructed by the Mayor's Office in early October that the approval would not be forthcoming at the October 9, 1996 meeting.

Following the FCRC meeting on October 9, Reiss, Muraskin, Regal, Sinel, and Klasfeld developed ideas to regularize the placement of commercial programming on Crosswalks. Reiss has characterized this as the Mayor's new initiative for fostering economic development and program diversity. As part of this initiative, DoITT was requested to start a review of Crosswalks' programming to determine which channels could be allocated for use by programmers excluded from Time Warner channels. In addition, the Corporation Counsel and DoITT were to work together to develop a set of procedures to govern selection of new vendors for Crosswalks. As Reiter has explained at her deposition in this action, the City attempted to put Fox News on Crosswalks to promote a diversity of ideas on television and to put different philosophies on cable.

Also on October 9, Time Warner received another written request from the City that Time Warner consent to the City's running Fox News and BIT with commercials on Crosswalks. Without such consent, the letter advised that the City intended to make available "for a limited period

of time" its Crosswalks network for commercial-free carriage of these programs.

On October 10, Time Warner rejected the proposal in writing, pointing out that the removal of commercials could not sufficiently change the nature of the programming to make it suitable for a PEG channel, and that the entire effort violated Time Warner's rights under the Cable Act and the First Amendment, since it sought to interfere with the cable operator's programming decisions.

The reaction of the City was swift. At 10:48 p.m. the City began to transmit BIT over a Crosswalks channel without any further notice to Time Warner. The transmission included some advertising, which Bloomberg has since pledged to eliminate should the injunction be lifted. The City intended to begin transmitting Fox News on a Crosswalks channel at midnight on October 11, but was prevented from doing so by the issuance of the TRO.

Fox was displeased that the City planned to treat it and Bloomberg alike. In addition, it was displeased about going onto Crosswalks without commercials. It preferred to run its programming with commercials, but turn over the revenue to the City. To the City, however, at least before it submitted its brief in opposition to this motion, running the programming with commercials would have required it to get permission from Time Warner. Nonetheless, the City and Fox recognized that running Fox News commercial-free was, at best, a temporary arrangement, as reflected in Fox's letter to Klasfeld of October 10 which indicated that Fox would *1383 not commit to providing its signal on a commercial free basis beyond December 31, 1996. The letter ended with the observation, "We certainly hope that well before that date Time Warner agrees to fulfill its previous commitment to carry [Fox News] on its system."

In defense of its action, the City represents that virtually all of the programming that would be replaced by Fox News and the Bloomberg service consists of repeat broadcasts of programs from the Opportunity Channel and the Electronic Bulletin Board that were aired earlier that day or week.

6. Summary of Factual Conclusions

The City argues that the evidence does not establish that it retaliated against Time Warner or engaged in a campaign to pressure Time Warner to agree to allow Fox News to be carried on one of Time Warner's cable channels. In-

stead, the City argues, the evidence indicates that it simply accepted Time Warner's decision on October 1 to reject the City's proposal regarding the channel swap, and that the City's actions after that point were not taken in response to what it admits was Time Warner's absolute right under both the Constitution and the Cable Act to reject the City's proposal. The City argues that it deferred a decision by the FCRC out of a legitimate concern that Time Warner had engaged in anticompetitive behavior, a concern justified by Time Warner's failure to address adequately the questions raised by Fox about Ted Turner's involvement in the Time Warner decision to choose MSNBC over Fox News, Moreover, the City argues that it planned to place Fox News on Crosswalks out of concern that a failure to do so would threaten, as the City put it at the time, the economic viability of Fox's entire expansion plan. Finally, it argues that it planned to place Fox News on a Crosswalks' channel out of a belief that New Yorkers needed more "diversity" in their news programming than is currently available to them.

I find that the evidence at the hearing establishes the following, when taken as a whole. In response to learning that it had not won the bidding battle with MSNBC, Fox used its direct access to the Mayor to seek the City's assistance. The City, in a strategy developed and executed by the Mayor's senior staff, then undertook to convince and, if necessary, force Time Warner to place Fox News on one of Time Warner's commercial channels. Fox and the City understood and agreed that Fox News could not run on television for any significant length of time without commercials, and, therefore, it was essential that Time Warner be convinced to place Fox News on a commercial channel.

At first, the City proposed swapping one of the Crosswalks channels in order to get Fox News added to the Time Warner system of commercial channels. This proposal eliminated, from the City's standpoint, any claim by Time Warner that its reason for not adding Fox News was insufficient channel capacity. It also reflected, however, the depth of the City's commitment to Fox, since it contemplated that the City would cede authority over one of its PEG channels to a commercial programmer. To disguise as best it could its willingness to give up twenty percent of the channel capacity on its Crosswalks systemchannels which were supposed to be dedicated to educational and governmental purposes, not competing commercial news programs-the City offered to swap a channel. That way, a program with a quasi-educational mission could be moved onto one of the Crosswalks channels. The City's proposal contemplated a violation of the Cable Act, including its anti-leasing provisions. As it acknowledged in the fateful meeting of October 1 at which it presented its proposal, there were risks that this proposal violated the law. As far as the City was concerned, the only issue was whether Time Warner was as prepared to run those risks as was the City.

At the meeting, and indeed even before the meeting, the City linked resolution of this issue with the upcoming FCRC review of the Time Warner merger. After the rejection of the City's proposal during the October 1 meeting, the City increased the pressure on Time Warner by linking Time Warner's satisfying Fox to the City's renewal of the franchises, which are due to expire in 1998.

*1384 The City's next proposal, that Time Warner grant a waiver and allow Fox News to be run on a Crosswalks channel designated "for governmental purposes," met with no more success than its proposal to swap a Crosswalks channel for a commercial channel. The City's plan to put Fox News on a PEG channel as a 24-hour commercial news program is without precedent. There is substantial evidence that the City understood that its proposal violated the Cable Act. It was certainly entirely at odds with the tradition of programming on PEG stations, both across the nation, and in New York City. It also violated the City's own procedures and guidelines for PEG programming, and, without Time Warner's consent, violated the franchise agreements as well.

When this second proposal was rejected, the City acted on its threat-held out since September 29-to hold hostage FCRC approval of the merger until Time Warner capitulated to the City's demands. The agency in charge of reviewing Time Warner's petition for approval of the merger had finished its substantive review and had assured Time Warner that it would be recommending approval of the merger. A decision was made at the Deputy Mayor level or higher on approximately October 3, however, that the merger would not be approved by the FCRC, a body controlled by the Mayor, without Time Warner consenting to let Fox News onto the cable system with commercials. Without FCRC approval of the merger prior to the closing on October 10, Time Warner was now vulnerable to a charge by the City that it had breached the franchise agreements.

Finally, the City took steps to put Fox News on Crosswalks, although stripped of its advertisements. Even in this format, however, the City was choosing programming

for a PEG channel that had no precedent in the City or beyond and that was not contemplated by the Cable Act.

I also find that the City would not have chosen to place BIT on a PEG channel but for its decision to place Fox News on a PEG channel. Bloomberg's request to the City highlighted how selective the City was in its treatment of Fox News, and thus gave the City no alternative but to accommodate Bloomberg. Bloomberg's request presented the City, however, with the opportunity of placing even more pressure on Time Warner. While Bloomberg expects significant advantages to accrue from any exposure in the New York market, it is Bloomberg's intention to enter the cable market in New York City on a commercial basis, that is, to make a profit by selling advertising and other commercial arrangements for its programming. It has no long-term interest in being on a noncommercial channel other than in gaining a foothold in the commercial market by developing viewer loyalty.

I find that Time Warner has established through compelling evidence that the City abused its power over the FCRC process and its control of the PEG programming on Crosswalks and has acted both to coerce Time Warner and to retaliate against it for its decision not to enter a contract with Fox News. The more difficult issue is whether such conduct provides a basis for continuation of the injunction. It is to that issue that I now turn.

III. Discussion

A. Preliminary Injunction Standard

To obtain a preliminary injunction, Time Warner must demonstrate (1) that it would be irreparably harmed should the injunction not be granted, and (2) a likelihood that it will succeed on the merits of its claim. NAACP v. Town of East Haven. 70 F.3d 219. 223 (2d Cir.1995). In order to satisfy the irreparable harm requirement, "[a] moving party must show that the injury it will suffer is likely and imminent, not remote or speculative, and that such injury is not capable of being fully remedied by monetary damages." Id. at 224.

[3][4] In an oft-cited opinion, the Third Circuit elaborated on the standard for irreparable harm in First Amendment cases.

It is well-established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestiona-

bly constitutes irreparable injury." But the assertion of First Amendment rights does not automatically require a finding of irreparable*1385 injury, thus entitling a plaintiff to a preliminary injunction if he shows a likelihood of success on the merits. Rather the plaintiffs must show "a chilling effect on free expression." It is "purposeful unconstitutional [government] suppression of speech [which] constitutes irreparable harm for preliminary injunction purposes." Accordingly, it is the "direct penalization, as opposed to incidental inhibition, of First Amendment rights [which] constitutes irreparable injury." Constitutional harm is not necessarily synonymous with the irreparable harm necessary for issuance of a preliminary injunction.

Hohe v. Casev. 868 F.2d 69. 72-73 (3d Cir.) (quoting Elrod v. Burns. 427 U.S. 347. 373. 96 S.Ct. 2673. 2689-90. 49 L.Ed.2d 547 (1976)) (other citations omitted), cert. denied, 493 U.S. 848. 110 S.Ct. 144. 107 L.Ed.2d 102 (1989). See also Bery v. Citv of New York. 97 F.3d 689. 693-94 (2d Cir.1996); Shea on Behalf of Am. Reporter v. Reno. 930 F.Supp. 916. 935 (S.D.N.Y.1996), petition for cert. filed,65 U.S.L.W. 3323 (U.S. Oct. 15, 1996) (No. 96-595).

[5] For the second prong of the preliminary injunction standard, the Second Circuit has recently reaffirmed that in cases requiring an injunction against the government, the plaintiff must show likelihood of success:

Ordinarily, the movant then has two options: it must either demonstrate a likelihood of success on the merits or it must raise "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." However, in a case in which "the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme," the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard.

Bery, 97 F.3d at 694 (citations omitted)

B. The City's Actions Violate the Cable Act.

A judgment of whether particular programming violates <u>Section 531(a)</u> must be grounded in an understanding of the structure of the Cable Act itself, the programming environment in which Congress imposed the regulatory structure, and the legislative history explaining the pur-

poses and content of <u>Section 531(a)</u>. The franchise agreements in this case are also relevant since they give life to, and, more importantly, evince the parties' understanding of, <u>Section 531(a)</u>.

In the instant case, the City's contravention of the Cable Act is evidenced by its disregard of the broad purposes and structure of the Act, a violation of the specific "governmental use" provision of Section 531(a), a violation of the franchise agreements, and, finally, a violation of Section 544(f)(1). I will discuss each aspect in turn.

1. The City's Actions Are at Odds With the Broad Purposes of PEG and the Structure of the Cable Act.

Congress did not enact the Cable Act PEG provisions in a vacuum. The PEG provisions reflect an understanding of the industry standard and prior government regulation under the 1972 FCC regulations. Congress intended to codify this understanding by ensuring franchising authorities could continue to require cable operators to provide public channels for individual and community access, educational channels for educational institutions, and governmental channels to show local government at work. This congressional intent is confirmed by Justice Kennedy's conclusion in a recent Supreme Court case where he stated that

Congress has not, in the [Cable] Act or since, defined what public, educational, or governmental access means or placed substantive limits on the types of programming on those channels. Those tasks are left to franchise agreements, so long as the channels comport in some sense with the industry practice to which Congress referred in the statute.

Denver Area, 518 U.S. at ---, 116 S.Ct. at 2408 (Kennedy, J. concurring in part and dissenting in part) (emphasis supplied). While the industry standard may vary somewhat around the country, see supra, it certainly does not encompass PEG use whereby a city attempts to compete with a cable operator or even to provide programming essentially*1386 identical in nature to that available on local commercial channels. Moreover, there is an industry standard in New York City. Since 1970 when it first began using PEG channels, New York City has used the "EG" channels to bring schools and government into the homes of the citizenry, facilitate better communication between educational and local governmental institutions and the public, and meet the needs of its citizens left unaddressed by commercial programming.

[6][7] The Cable Act does not require PEG access nor establish the exact meaning of PEG, but it does set an outer limit to PEG. Section 531(a)'s phrase "public, educational or governmental use" is not without meaning. It establishes a limit on both the identity of the user and the content of the program. A franchise agreement gives life to this provision, but neither a franchise agreement, nor a party's actions, may violate the substantive meaning of Section 531(a). While it is unnecessary to determine the exact limits of governmental use-nor do I want to, given the importance of governmental flexibility in the face of changing technology and public needs as explained below, it is clear that no matter what the contours of that line, the City may not use its channels as it intends here.

Further evidence that the City's action violates the Cable Act can be found in the overall structure of that Act. Both Fox News and Bloomberg had alternatives to a PEG station. In addition to continuing negotiations for carriage on Time Warner's regular channels, these programs could have applied for commercial space on a leased access channel, pursuant to Section 532 FN16 That Section provides a remedy for this situation-where a cable operator refuses to carry a programmer for whatever reason-by ensuring that a rejected programmer may lease access on the cable system, without permission from the cable operator. The mere fact that this option is not immediately available to a programmer because the leased access channels are full does not sanction a city diverting PEG channels, which were designed for a different type of use, to the needs of such commercial programmers. New York City cannot make an end-run around the congressional determination that leased access is the solution to this type of situation, not the use of channels allocated for public, educational, and governmental access.

FN16. Moreover, to the extent a programmer believes Time Warner has excluded it from commercial channels in violation of the law, it, of course, has recourse to the legal system. And indeed, Fox has pursued this option. See Fox News Network v. Time Warner Entertainment Co., No. 96-4963 (E.D.N.Y. filed Oct. 9, 1996).

2. The City's Actions Violate the Governmental Use Provision of Section 531(a).

[8] The parties dispute the meaning of the term "governmental use" in the Cable Act. The City argues that the PEG provision sanctions any use by the government-if the

actor is the government, the content of the program is irrelevant. The City argues that under Section 531(a) the requirement that a channel be reserved "for public, educational or governmental use' is automatically satisfied if the user is the City of New York, because the City is a government." (City Mem. at 16) (emphasis in original). Thus, it contends that it could, if it desired, run any commercial programming it wanted. Such a reading is at odds with both the language of the statute, the legislative history, the City's practice, and even the advice it received from its own legal counsel and cable law expert when it negotiated its franchise agreement with Time Warner. Time Warner argues that "governmental use" refers to the purpose of the channel: to provide programming related to governmental purposes.

[9] I find the City's reasoning unpersuasive. I do not accept the City's reading of a portion of the legislative history. The City cites the following section of the House Report:

it is integral to the concept of the use of PEG channels that such use be free from any editorial control or supervision by the cable operator.... There is no limitation imposed on a franchising authority's or other governmental entity's editorial control over or use of channel capacity set-*1387 aside for governmental purposes. However, the Committee does not intend that franchising authorities lease governmental channels to third parties for uses unrelated to the provision of governmental access....

H.R.Rep. No. 98-934, supra, at 47,reprinted in U.S.C.C.A.N. at 4684. I do not find that this section supports a reading of the PEG provision that sanctions any use of a governmental channel so long as the user is the government. This section of the House Report is found in the "Section-by-Section" analysis of the Act. The disputed language is in reference to the editorial control of the government, not the overall purpose of PEG. The purposes of PEG are discussed in the beginning of the House Report, and thus govern any interpretation of a particular section. Indeed, the section that describes the purposes of PEG is amply clear on the appropriate content of such channels. The House Report states

[p]ublic access channels are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas. PEG channels also contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government at work.

Id at 30, reprinted in U.S.C.C.A.N. at 4667. From this statement it is clear that the governmental use envisioned by Section 531(a) is the goal of "showing the public local government at work." To the extent the House Report addresses the identity of the user of the channel, it makes clear that the intended users are the public, and educational and governmental institutions, for their own purposes. It states that

[I]ocal governments, schools systems, and community groups, for instance, will have ample opportunity to reach the public under [the Act's] grant of authority to cities to require public, educational, and governmental (PEG) access channels.

Id. at 19, reprinted in U.S.C.C.A.N. at 4656.

Moreover, if I were to follow the City's interpretation of the PEG provision, the entire statutory provision would be nonsensical. Channels for "public, educational, and governmental use" would have no meaning-instead, a franchising authority could require the cable operator to set aside channels for the government, and the government could do as it pleases with these channels, such as provide educational and public access. Indeed, the government could become a competitor with a cable operator for the provision of commercial programming instead of providing access for those voices who generally will not have commercial access: the public at-large, educational institutions, and government programs. Under the City's interpretation of the statute, not only would "public" and "educational" be subsumed under "governmental," any programming, so long as it is chosen by the government, would be acceptable. This not only renders Section 531(a) incoherent, it also obviates the need for the entire scheme of the Cable Act which creates three distinct types of programming: that chosen by the cable operator, that leased by other programmers, and PEG use. I certainly do not intend to handcuff the City's efforts to use the PEG channels in innovative ways that best serve the public, but I may not allow the City to use such a valuable resource in ways clearly unintended by the Cable Act.

To be clear, I am not determining whether a government can ever run "commercial" programming on a PEG station. I do not find that the Cable Act bans advertising on PEG stations. If a municipality determines advertising is useful to fund programming on local government at work or other appropriate PEG programming, I find nothing in

the Cable Act that would prevent a municipality from doing so.

[10] The City's argument that Section 531(a) sanctions any use by the government is, in any event, substantially undermined by the fact that this is only the latest in a series of attempts by the City to justify its actions. Before filing its brief in opposition to the *1388 preliminary injunction motion, the City never took this position. Indeed, the City's conduct over the years supports my reading of the Act-that the Act imposes some limits on governmental use. The City's actions, described in detail above, include its limited use of government channels, the waivers sought for commercial programming, the proposal to "paper the deal" with Fox and Time Warner, the admission that its proposal ran certain legal "risks" and, finally, the City's own shifting justifications for its action throughout this litigation.

These shifting justifications are powerful evidence that the City does not believe its own position. At the TRO hearing the City labelled Time Warner's challenge frivolous, asked this Court to look only at the content of the programming, and justified BIT as "educational." It contended that it had the right to run any news program as "educational" programming, so long as it did so without commercials. Now the City argues it may place Fox News on Crosswalks under a different PEG prong, that is, the "governmental" element of PEG, and, moreover, that it may run any program it wishes under that prong with commercials. FN17

FN17. In closing arguments, the Corporation Counsel for the City continued to contend that the City has the right under both the 1984 Act and the franchise agreements to run Fox News and BIT on Crosswalks as 24-hour news programs with advertising, but that the City intends only to run them without advertising.

Finally, and most significantly, I simply do not agree with the City's interpretation of Section 531(a). The City argues that Section 531(a) only prescribes the identity of the user and not the type of use because such a reading of the statute is content-neutral. The City argues that a court should presume that Congress would enact a content-neutral statute so as to avoid a violation of the Constitution and that any other interpretation risks a finding that the statute is not content neutral. FNIS Therefore, the City argues that I should accept its reading of the statute.

FN18. In a facial challenge to Section 531(a), in which Time Warner had the burden of proving that there is no set of circumstances under which the Cable Act would be valid, the D.C. Circuit held that the provision is content neutral and thus constitutional. *Time Warner*, 93 F.3d at 971-73

I find the City's reasoning unpersuasive. While the statute refers only to "governmental use," the statute codified the idea that a governmental channel was to show "local government at work." H.R.Rep. 98-934, supra, at 30, reprinted in 1984 U.S.C.C.A.N. at 4667. Therefore, an interpretation which states that the Cable Act sanctions any use by the government belies the intent and purpose of Section 531(a). Even the phrasing used by Congress indicates that the grant of control over certain channels was so that they could be put to particular uses. If it had wished to identify only the user of the channels, Congress could have expressed that concept far more directly.

Nor does the classification scheme which I find Congress to have adopted mean that the statute is unconstitutional on its face. To the contrary, to interpret the "G" of PEG programming to require the programming to show local government at work runs no more risk of rendering the statute unconstitutional than interpreting the "G" to allow the government to televise anything it wishes. In either event, the government will be required to apply the statute in a manner consistent with the Constitution. Time Warner, 93 F.3d at 973. Indeed, the unbridled discretion reflected in the City's definition carries with it the very risk that the government will abuse that discretion by selecting speakers, as it has here, without reference to the purposes of the Cable Act.

FN19. Because of the result achieved herein, I need not reach Time Warner's claim that the statute is unconstitutional as applied or decide whether Time Warner has standing to make that challenge.

[11] Applying Section 531(a) to the City's conduct here, I find that the City's decision to air a 24-hour news program, substantially identical in feed to that aired on commercial channels across the country, with the relatively minor exception of the inclusion of some minutes of local New York news, constitutes in the circumstances of this case a use of a PEG channel in a way clearly unintended*1389 by Congress. There are several underlying purposes to the PEG channels. These purposes include a desire to respond to local needs, create space for voices

that would not otherwise be heard, air programs needed by a community that may not otherwise be commercially viable, and, for governmental channels, show local government at work. While a failure to serve any one of these purposes may not itself be dispositive, in the instant case, the City's use of Crosswalks is at odds with all four purposes.

First, neither Fox News nor BIT responds to local needs. These 24-hour news programs are largely duplicative of programming already on commercial stations. New York City is not Aurora, Colorado. New York cable subscribers receive over 350 hours of national and local news and information programming a day.

Second, neither Fox News nor BIT will contribute a voice that is not already heard. While I make no judgments about their content, I find that these commercial news programs do not provide space for a class of speakers not already present on commercial stations.

Third, neither Fox News nor BlT needs a government subsidy in order to reach large audiences. These for-profit news programs are able to generate revenue through commercial advertising and contracts with cable operators, something a school that would use an educational channel, for example, is not able to do.

Finally, neither Fox News nor BIT will allow the citizenry to see local government at work, except in the most incidental fashion. A 24-hour news station may *report* on local government, but the news program is not bringing local government into the homes of the public. Rather, to the extent it is covering local events, it is doing so in a manner no different from another commercial news program. FN20

FN20. In its closing argument, Bloomberg proffered that it could, with little technical difficulty, create a news product different from that the City ran on October 10. This new product would incorporate, for some unspecified portion of each day, footage reflecting local government events in a portion of the screen directly across from that portion of the screen in which the news would be presented. This proposal is intended to bring BIT more in line with traditional PEG programming by incorporating coverage of local government at work. I refrain from further comment about whether this proposal, if presented on a record indicating that the City chose such programming for a reason consistent with <u>Section 531(a)</u>, would pass muster since I may not render an advisory opinion about a hypothetical set of facts not properly before me.

Thus, wholly apart from any examination of the City's improper motives in giving Fox News and BIT the preferential treatment at issue here, it is apparent that the City violated Section 531(a) in placing and attempting to place these programs on Crosswalks. In sum, for the reasons discussed in this section, I do not find the City's interpretation-that the City does not violate the PEG provision when the user is the government, no matter what the use of the channel-persuasive. I find further, that by its actions, the City has violated Section 531(a).

3. The City's Actions Violate the Franchise Agreements.

[12] The parties dispute whether the franchise agreements permit the City to place Fox News and BIT on a government channel. I find that the agreements do not permit such use, whether the programs are shown with or without commercials, absent written permission from Time Warner to do so. I reach this conclusion based on the language of the agreements, the extrinsic evidence surrounding the negotiation of the 1990 agreement which sheds light on the parties' intent in reaching those agreements, as well as the City's conduct under the agreements.

FN21. As this Court has informed the parties, a finding that the City has breached the franchise agreements will not, by itself, support the issuance of a preliminary injunction. Nonetheless, the parties have spent considerable energy on the issue of breach because of its relevance to the claim that the City has violated the Cable Act and because of the light it sheds on the City's motivations in placing BIT and Fox News on Crosswalks.

[13][14] The dispute centers on the word "commercial." I find that the parties understood this term to refer to the presence of *1390 commercials and whether the programmer is a for-profit company. The parties both argue that the language in the franchise agreements is unambiguous but offer competing interpretations of that "unambiguous" language. While existence of such a debate as to meaning does not create an ambiguity, I find nevertheless that the language is ambiguous, and therefore will rely on parol evidence not to vary or add to the terms of the contract, but only to interpret and give effect to the parties'

intent. A court may do so, even if the contract contains a merger clause. <u>Proteus Books Ltd. v. Cherry Lane Music Co.</u>, 873 F.2d 502, 509-10 (2d Cir.1989). The parol evidence in this case persuades me that both franchise agreements contemplated only noncommercial uses for the PEG stations.

[15] Even more persuasive, however, is the City's conduct up until October 1996. Such conduct is relevant to understanding the contract, even if the contract is unambiguous, which it is not. The Second Circuit has held that the "parties' interpretation of the contract in practice, prior to litigation, is compelling evidence of the parties' intent." Ocean Transport Line. Inc. v. American Philippine Fiber Indus., 743 F.2d 85, 91 (2nd Cir.1984). The City's actions, discussed above, reflect an understanding that the government was free to use its channels for noncommercial services only. Indeed, the Assistant Commissioner at DoITT testified that programming must be noncommercial to comply with Crosswalks' mission and objectives. Additionally, both agreements make clear that the stations are to be used for governmental purposes, and Fox News and BIT, as the City intends to run them, do not fall within the ambit of appropriate governmental purposes. I now address the commercial nature of the programming.

Fox News and BIT are commercial programming designed to compete in the commercial market and were not created for a PEG environment. The commercial nature of Fox News is evident from that programmer's negotiations with Time Warner where Fox News intended to be carried on Time Warner channels, complete with commercials. Moreover, everywhere else in the country Fox News is carried, it is aired with commercials. Indeed, one purpose in obtaining carriage was so it could be seen by advertising decisionmakers. I base these findings on the facts discussed above, most importantly the letter dated October 10 from Fox News to the City where Fox News agreed to run on Crosswalks without commercials only through December 31, 1996, and the letter dated October 2 from the City to Time Warner requesting a waiver for Fox stating that Fox News needed commercials to remain commercially viable. Moreover, the City's own justification for its actions-that the presence of Fox News retains and creates jobs-is only true to the extent Fox News is commercially profitable, a profit that will be based, in part, on its ability to sell advertising.

I need not determine the extent of BIT's commercial nature because in two instances Bloomberg has admitted to its commercial content and goal. First, in a letter from Bloomberg to Time Warner in early September 1996, it angled for carriage on the Time Warner system under the FTC consent decree. The intent of the letter appears to be to convince Time Warner that BIT would satisfy the requirement that Time Warner carry an "Independent Advertising-Supported News and Information Video Programming Service" under Time Warner's consent decree with the FTC. Bloomberg cannot have it both ways. It cannot try to convince Time Warner in September 1996 that it is commercial enough to count as competition under the consent decree and then in October 1996 argue it is not so commercial as to violate the franchise agreement. Second, at the TRO hearing Bloomberg's general manager of television news, Jonathan Fram, testified to this Court that Bloomberg's goal for being on Crosswalks was to enter the New York commercial market as a 24hour news channel.

The City argues that stripping Fox News and BIT of their commercials transforms these programs into noncommercial offerings. I find this unpersuasive. Both Fox and Bloomberg are for-profit entities that plan to create a for-profit business in New York City. Even if they agree to forego commercials in the short-run, they cannot *1391 and do not intend to do so for long. It is not their intent to stay on the PEG channels any longer than necessary. I find that both Bloomberg and Fox hope and expect that access to the New York market through Crosswalks will win for them the opportunity to run on the commercial channels in the near future.

Given the clear commercial intentions of Fox and the admissions by Bloomberg, I find these programs are commercial for the purposes of this dispute and therefore their placement on a governmental channel violates the franchise agreements.

4. The City's Actions Violate Section 544(f)(1).

[16] The Cable Act protects the First Amendment rights of PEG users, leased access users, and cable operators. In this case, Time Warner alleges that the placement of Fox News and BIT on Crosswalks violates Time Warner's editorial autonomy under Section 544(f)(1). The analysis for such a violation is substantially the same as for a violation of the First Amendment and, therefore, I conclude for the same reasons discussed below, that the City's actions violate Section 544(f)(1) of the Cable Act.

C. The City's Actions Violate Time Warner's First Amendment Rights.

1. First Amendment Jurisprudence

[t]hrough "original programming or by exercising editorial discretion over which stations or programs to include in its repertoire," cable programmers and operators "see[k] to communicate messages on a wide variety of topics and in a wide variety of formats."

<u>Id. at ---, 114 S.Ct. at 2456</u> (quoting <u>Los Angeles v. Preferred Communications. Inc.</u>, 476 U.S. 488, 494, 106 S.Ct. 2034, 2037, 90 L.Ed.2d 480 (1986))

In Turner, which involved a First Amendment challenge by cable operators and programmers to the "must-carry" provisions of the 1992 Cable Act, the Supreme Court addressed the appropriate level of scrutiny to apply to the regulation of cable operators. As an initial matter, the Court held that the relatively deferential standard that applies to the regulation of broadcast television was inappropriate for cable. Id. at ---. 114 S.Ct. at 2456. The Court noted that the "justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium," id at ----. 114 S.Ct. at 2456, and held that "[t]he broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium." Id. at --- 114 S.Ct. at 2457.

The *Turner* Court held that strict scrutiny-termed by the Court "exacting" or "rigorous" scrutiny-applies to content-based cable regulations and that intermediate scrutiny applies to content-neutral cable regulations. FN22

FN22. In <u>Denver Area</u>, 518 U.S. at ---, 116 S.Ct. at 2374, which involved a challenge to three provisions of the Cable Television Consumer Protection and Competition Act of 1992 regulating "patently offensive" material on leased access and public access cable channels, a

plurality of the Court suggested that the Court's rejection of the broadcast analogy in Turner was triggered by the specific facts of Turner, and that the distinction was not necessarily applicable to the facts at issue in Denver Area. See id. at ---. 116 S.Ct. at 2388 ("While that distinction was relevant in Turner... it has little to do with a case that involves the effects of television viewing on children."). While the plurality distinguished Turner 's reasoning, it nevertheless declined to adopt the broadcast cases as a wholesale analogy applicable to cable regulation, see id at --, 116 S.Ct. at 2385, or the specific standard of scrutiny applied in the broadcast cases, although it did rely on one broadcast case, FCC v. Pacifica Found., 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978), in the development of its analysis.

Justice Kennedy's Denver Area opinion, in which Justice Ginsburg joined, states flatly that "strict scrutiny is the baseline rule for reviewing any content-based discrimination against speech." Id. at ---, 116 S.Ct. at 2413 (Kennedy, J. concurring in part and dissenting in part). Because of the clearly content-based actions of the City in this case, I find that Turner's dichotomy between content-based and content-neutral regulation of cable programming, rather than the broadcast analogy, is the proper analytical framework in the present context.

*1392 Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny. In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.

<u>Id. at ---, 114 S.Ct. at 2459</u>. See also <u>Bery, 97 F.3d at 696-97</u>.

[18] The Court acknowledged that "[d]eciding whether a particular regulation is content-based or content-neutral is not always a simple task." <u>Turner</u>: 512 U.S. at ----. 114 <u>S.Ct. at 2459</u>. In making this determination, the Court held that

[a]s general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based. By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral.

Id. at ---. 114 S.Ct. at 2459.

As Turner itself reaffirmed, speakers have a First Amendment right not to be compelled to speak by the government. See Turner, 512 U.S. at ---. 114 S.Ct. at 2459 ("Laws that compel speakers to utter or distribute speech bearing a particular message are subject to ... rigorous scrutiny."). In *The Miami Herald Pub. Co. v. Torn-illo.* 418 U.S. 241, 256, 94 S.Ct. 2831, 2838-39, 41 L.Ed.2d 730 (1974). EN23 the Court held that where the government forces a newspaper to carry speech that it otherwise would not want to carry, the First Amendment is violated to the same extent as when the government directly prohibits speech. FN24 See also Rilev v. National Fed. of the Blind of N.C., Inc., 487 U.S. 781, 795, 108 S.Ct. 2667, 2677, 101 L.Ed.2d 669 (1988) (holding that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech."); FN25 Pacific Gas & Elec. Co. v. Public Utilities Comm'n. 475 U.S. 1, 15, 106 S.Ct. 903, 911, 89 L.Ed.2d 1 (1986) (plurality opinion) (rejecting*1393 regulation in part because it "identifi[ed] a favored speaker" based on the content of that speaker's speech, "and force[d] the speaker's opponent ... to assist in disseminating the speaker's message. Such a requirement necessarily burdens the expression of the disfavored speaker."). FN26

FN23. In *Tornillo* the Court struck down a Florida statute which required newspapers that print editorials critical of a candidate for elective office to print that candidate's response to the editorial.

FN24. While the Court in Turner noted that government action that "requires the utterance of a particular message favored by the Government" violates First Amendment principles, Turner. 512 U.S. at ---. 114 S.Ct. at 2458, the Court distinguished Tornillo and held that its strict scrutiny analysis was not appropriate in the context of the must-carry provisions. The Court gave three reasons for this holding. First, the Court noted that the must carry requirements were content-neutral. Id. at --, 114 S.Ct. at 2465. Second, the Court stated that the must carry rules would not force cable operators "to alter their own messages to respond to the broadcast programming they are required to carry." Id Finally, the Court held that due to technological differences between the newspaper and cable industries, Tornillo was not an appropriate analogy. As in Turner, Tornillo does not directly control this case. It does, however, provide important guidance for the situation with which this Court is presented-namely, content-based decisionmaking by the City that compels unwanted speech.

FN25. In Riley the Court struck down a statute which required a professional fundraiser to disclose to potential donors the percentage of charitable contributions collected during the fundraiser's prior twelve months that were actually turned over to the charities.

<u>FN26.</u> In *Pacific Gas* the Supreme Court struck down a public utilities commission order that a utility permit a third party to use space in the utility's newsletter-a newsletter that would then be distributed by the utility in its billing envelopes.

A second guiding principle, also discussed in *Turner*, is that the government regulation of speech based on its content is subject to strict scrutiny. For example, in *Arkansas Writers' Project, Inc. v. Ragland.* 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987), the Court struck down an Arkansas sales tax exemption that applied only to newspapers and "religious, professional, trade and sports" magazines or journals. The Court held that "[s]uch official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press." *Id.* at 230, 107 S.Ct. at 1728.

Significantly, the Court held that "Arkansas' system of selective taxation does not evade the strictures of the First Amendment merely because it does not burden the expression of particular views by specific magazines." *Id.* The Court held that

Arkansas faces a heavy burden in attempting to defend its content-based approach to taxation of magazines. In order to justify such differential taxation, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.

Id. at 231, 107 S.Ct. at 1729. The Court found that the regulation failed this strict scrutiny test. See also R.A.V. v. Citv of St. Paul, 505 U.S. 377, 382, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992) ("The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid."); Police Dep't of Chicago v. Moslev. 408 U.S. 92, 95, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972) (holding that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content").

[20][21][22] A final principle of importance to this case is that viewpoint-based discrimination-as opposed merely to content-based discrimination-is particularly unacceptable under the First Amendment. For example, in *Rosenberger v. Rector and Visitors of the Univ. of Virginia.* 515 U.S. 819. 115 S.Ct. 2510. 132 L.Ed.2d 700 (1995), the Supreme Court struck down a University regulation which denied funding to a Christian newspaper based on the religious content of that newspaper. The Court held that the student activity fund was a limited public forum and that the University's actions violated the Christian group's First Amendment rights because the University discriminated based on viewpoint.

It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.... In the realm of private speech or expression, government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional.

Rosenberger, 515 U.S. at ---. 115 S.Ct. at 2516. Moreover, as the Court recognized, discrimination based on the viewpoint of a speaker is the most pernicious type of govemment interference with speech.

When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Rosenberger. 515 U.S. at ---. 115 S.Ct. at 2516. See also R.A.V.. 505 U.S. at 391-92. 112 S.Ct. at 2548 (holding that the City "has no such authority to license one side of a debate to fight freestyle, while requiring the *1394 other to follow Marquis of Queensberry rules").

2. Applying the First Amendment

Time Warner contends that its First Amendment rights have been violated in two ways, each of which constitutes irreparable harm FN27 First, Time Warner claims that it has First Amendment rights in the City's PEG channels. Time Warner argues that when the City placed programming on Crosswalks which was inappropriate for a PEG channel, the City lost the right to use that PEG channel, and the right "reverted" to Time Warner. FN28 Therefore, Time Warner argues, when the City placed on that channel programming which Time Warner did not wish to carry, the City forced Time Warner to speak in violation of the First Amendment Second, Time Warner argues that the City's actions in this case-including placing BIT and preparing to place Fox News on Crosswalks-are intended to compel Time Warner to reverse its initial decision and accept Fox News on its regular commercial channels. This argument is based on Time Warner's First Amendment rights in the commercial channels under its control. FN29 I will address both of these theories in turn.

FN27. It is arguable that the City's actions in placing BIT and preparing to place Fox News on Crosswalks constituted retaliation for Time Warner's constitutionally-protected editorial decision to refuse to carry Fox News. See Mt. Healthv City Sch. Dist. Bd. of Educ. v. Doyle. 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977); Graham v. Henderson, 89 F.3d 75, 79 (2d Cir. 1996). Although Time Warner pleaded a factual basis for a retaliation claim, and presented evidence at the hearing addressed to such a claim, it did not plead a cause of action for retaliation. Therefore, I decline to decide whether

> the City's actions constitute impermissible retaliation except insofar as such an analysis is relevant to deciding whether the City has also acted to compel Time Warner to alter its editorial decision.

> <u>FN28.</u> At the hearing on the preliminary injunction, the Court referred to this argument as the "reversion theory." Counsel for Time Warner prefers to call this theory the "continuing rights theory."

FN29. At the hearing, the Court referred to this argument as the "coercion theory."

a. Time Warner's First Amendment Rights in the PEG Channels

[23] The central issue in determining whether Time Warner has First Amendment rights in the City's PEG channels is essentially a "chicken and the egg" problem. On the one hand, Time Warner argues that it has an underlying right to all of the channels. Time Warner contends that because the City's right to use certain channels comes only from either Section 531(a) of the statute or the franchise agreements, once the City is violating that right, the channels revert to Time Warner. Under this analysis, because the City is using Crosswalks for non-PEG purposes, Time Warner has regained its right to use the channels; and prior to the entry of the TRO, Time Warner was compelled by the City to carry speech that it did not want to carry, in violation of the First Amendment. FN30 In contrast, the City argues that no one owned the channels first, and that Time Warner's only right to any channels arises from the franchise agreements. If this is true, then Time Warner has no reversionary right to the PEG channels because it never had a right to use them in the first place.

FN30. At the hearing on Time Warner's TRO application on October 11, 1996, the City conceded that if the PEG provisions were being violated, Time Warner's First Amendment rights were being violated. The City has changed its position, and now argues that because Time Warner has no right to the PEG channels, it has no right to complain if the City places Fox News and BIT in its channels.

[24] Time Warner finds support for its argument in Section 531(d) of the Act, which requires a franchising authority to prescribe

(1) rules and procedures under which the cable operator is permitted to use [PEG] channel capacity for the provision of other services if such channel capacity is not being used for the purposes designated, and (2) rules and procedures under which such permitted use shall cease.

47 U.S.C. § 531(d). The legislative history explains that this provision applies to channels that are "dark"-or "fallow" in the jargon*1395 of New York City's regulatory scheme. FN31 And indeed, the franchise agreements here have procedures for the use of channels which are fallow. FN32 Section 531(d), however, stands for little more than that unused channel capacity should be used by someone. As the legislative history also explains, Congress intended that any PEG-designated channel which had been fallow be returned to the franchise authority for its use as quickly as possible when PEG programming becomes available for it. FN33

<u>FN31.</u> The House Report stated that when PEG channel capacity is not being used,

the needs and interests of cable subscribers would be better served by allowing unused PEG channel capacity to be used by the operator for the provision of other cable services, rather than those channels remaining 'dark' until use of this channel capacity for PEG purposes increases. Section 611(d), which applies to all existing and future franchises, provides for the use, under these circumstances, of channel capacity designated for PEG purposes, and directs the franchising authority to prescribe rules and procedures for the use of unused PEG channel capacity by the cable operator.

H.R.Rep. No. 98-549, supra, at 47, reprinted in 1984 U.S.C.C.A.N. at 4684.

FN32. For example, Section 4.1.06 of the 1990 Agreement permits Time Warner to request that the City allow it to use any "unused" channel time on the PEG channels. Before Time Warner can request access to the unused channel, the channel must have been unused for ninety days. After a request in writing, Time Warner can begin using the channel within thirty days, unless, within that time, the City notifies Time Warner that it does not consent to Time Warner's use of

the channel. In addition, once Time Warner begins using the channel, the City, in its discretion, can require Time Warner to give the channel back.

FN33. The House Report states that

The Committee notes that where demand for use of such channel capacity for [PEG] purposes develops, subsection 611(d) is not intended to frustrate use of these channels for those purposes. Accordingly, the franchising authority is further directed to develop rules to assure that when there is appropriate demand for use of those channels designated for PEG purposes, cable operator use of those channels ceases.

H.R.Rep. No. 98-549, supra, at 47, reprinted in, 1984 U.S.C.C.A.N. at 4684.

A second statutory provision supporting Time Warner's contention is <u>Section 531(a)</u>, which states that the City "may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use *only to the extent provided in this section.*" 47 U.S.C. § 531(a) (emphasis supplied). By only allowing the City to set aside PEG channels "to the extent provided in this section," Time Warner argues that unless the City is in compliance with the requirements of <u>Section 531</u>, it may *not* use the channels.

[25] While Section 531(a) describes the proper use of a PEG channel, it does not establish an underlying right of a cable operator to such channels. To the contrary, as noted above, prior to the enactment of the Cable Act, franchising authorities throughout the country-including in New York City-were requiring as a condition of granting the franchise that cable operators set aside PEG channels for the use of the franchising authorities. See Time Warner. 93 F.3d at 972. Thus, the City may be violating the PEG provision of Section 531(a), but it does not necessarily follow that the right to the channel reverts automatically to Time Warner.

[26][27] The best reading of the statutory framework is that the answer to who owned the channels first is neither party-the rights to the channels were created simultaneously at the time the franchise agreements were signed. Without the franchise agreements, neither the City nor the cable operator would have a right to use any channel. As

explained by Justice Kennedy in his Denver Area concurrence/dissent,

the editorial discretion of a cable operator is a function of the cable franchise it receives from local government. The operator's right to exercise any editorial discretion over cable service disappears if its franchise is terminated.... The cable operator may own the cables transmitting the signal, but it is the franchise-the agreement between the cable operator and the local government-that allocates some channels to the full discretion of the cable operator while reserving others for public access.

Denver Area, 518 U.S. at ----, 116 S.Ct. at 2410.

*1396 Accordingly, I find that even though the City is misusing the PEG channels, Time Warner has no First Amendment right to editorial discretion over channels that it never had a right to use. See id. at ---. 116 S.Ct. at 2394 (observing that the statute at issue in Denver Area" does not restore to cable operators editorial rights that they once had, and the countervailing First Amendment interest is nonexistent, or at least much diminished"). Accordingly, Time Warner's argument based on its underlying First Amendment interest in the PEG channels must fail.

b. Time Warner's First Amendment Rights in the Commercial Channels

In order to determine if Time Warner is entitled to a preliminary injunction, I must decide if it has shown irreparable harm. This requires proof that Time Warner has a First Amendment interest that is being injured by the City's actions. Next, I must determine whether Time Warner has shown a likelihood that it will succeed in proving that the City violated this First Amendment interest. This requires that I determine what standard of First Amendment scrutiny is applicable here, and whether the City's actions pass that test. I will address the two parts of the preliminary injunction standard in turn.

i. Irreparable Harm

[28] Time Warner contends that by engaging in a pattern of conduct for the purpose, and with the effect, of forcing Time Warner to carry Fox News on its commercial channels, the City has violated Time Warner's First Amendment right as a cable operator to exercise editorial discretion. The City does not contest that Time Warner has a

First Amendment right to the independence of its programming decisions over the commercial channels. It contends, however, that it has not interfered with that right.

The City's first argument is that it acted for legitimate purposes unrelated to an attempt to influence Time Warner's editorial discretion. The City asserts essentially two interests to justify its actions in this case:

(i) the expansion of the diversity of voices contributing live news, information and public affairs programming on New York City-franchised cable systems; FN34 and (ii) the promotion of economic development and employment opportunities by supporting the availability of New York City-produced news, information, and public affairs programming.

FN34. The City has also endeavored to justify its actions by referring to its concern about Time Warner's alleged anticompetitive behavior. This justification is related to the City's concern with diversity of programming, and thus these two City purposes will be considered together.

I find that the City's justifications for its actions in this case are entirely unconvincing. As discussed above, I find that a substantial and motivating factor in the City's decision to place Fox News and BIT on Crosswalks was the desire to compel Time Warner to accede to the City's request that Fox News be placed on Time Warner's system of commercial channels. I reject the City's contention that after Time Warner said "no" to its October I "swap" proposal, the City no longer wished to place Fox News on a commercial channel, but merely wanted a waiver so that it could be placed on Crosswalks. Among other evidence, the City's assertion is belied by the October 10 Ailes letter, which indicates that both Fox and the City continued to share the goal of Fox News being on one of Time Warner's commercial channels. The letter stated that

[w]e share the City's view that this approach is, at best, a temporary arrangement, and we would not commit to providing the [Fox News] signal on a commercial-free basis beyond December 31, 1996. We certainly hope that, well before that date, Time Warner will agree to fulfill its previous commitment to carry [Fox News] on its system.

As this letter reveals, the City was well aware that Fox was only willing to be on Crosswalks without commercials for a limited time, and it continued to be both Fox's

and the City's goal that Fox News be placed on one of Time Warner's commercial channels in the very near future.

*1397 Moreover, taking both of the City's proffered justifications in turn, I find that Time Warner has established a likelihood that it will succeed in proving that each of these reasons is pretextual. And, even if Time Warner had not made such a showing, importing and applying to the City's justifications an analysis under Mt. Healthy, I find that the City has not carried its burden of establishing that it would have taken the steps it did even in the absence of the constitutionally impermissible motive I have found it had See Mt. Healthy City School Dist. Bd. of Ed. v. Doyle. 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977); Graham v. Henderson. 89 F.3d 75, 79 (2d Cir.1996).

With respect to the City's purported desire to increase the diversity of news programs available to New Yorkers, it must be observed as an initial matter that it is not self evident that this is in fact a constitutionally permissible purpose when the City has favored specific speakers in pursuit of this goal. In any event, the City has offered no evidence in support of its contention that there is insufficient news programming in New York City, that there is insufficient "diversity" in that programming, or that it has had any concern regarding this issue other than in response to the Ailes' request for assistance. Nor, of course, did the City, before placing BIT on Crosswalks, devise a content-neutral procedure to give news and public affairs programming excluded from Time Warner's commercial channels access to Crosswalks.

Given this record, the conclusion is inescapable that the City's intonation of the rubric "diversity" is a thinly disguised reference to its preference for the editorial content of Fox News. As such, this rationale for the City's actions cannot constitute a permissible purpose for its actions. FN35

FN35. For similar reasons I reject the City's suggestion that it was concerned about anticompetitive behavior by Time Warner. Although DoITT could have raised concerns about any anticompetitive effect of the merger, or about any inappropriate manner in which Time Warner wielded its bottleneck monopoly power in making programming decisions at any time during the summer of 1996, it did not do so. Moreover, Time Warner's programming did not change after October 1, 1996. It was no more or less re-

> flective of any antitrust problem after October 1 than before. What did change was Fox's call to the Mayor, raising the antitrust issue, and Time Warner's rejection of the City's proposals. While the City insists that Time Warner did not respond sufficiently to Fox's charges to put the issues raised by Fox to bed, the record reveals that these concerns regarding anticompetitive behavior were not addressed by DoITT in a manner at all similar to the way in which DoITT addressed other issues of concern. Instead, the record supports the inference that the issue of the anticompetitive nature of Time Warner's programming decisions was, again, simply another way of expressing the City's disappointment that Fox had not been chosen by Time Warner.

The City's second justification fares no better. While the economic health of a city and the preservation and creation of jobs is an appropriate and essential concern of city government, the record here does not indicate that this concern was other than pretextual in the context of this dispute.

It is not disputed that this Mayor has made job retention and creation a priority of his administration and that the City negotiated an agreement with Fox in line with those goals. There is no persuasive evidence in the record, however, that any existing or projected jobs at Fox are endangered by its failure to be carried on cable channels in New York City. To the contrary, Fox claimed that the entry of its twenty-four hour news channel onto the national market this fall was an unparalleled success. In contrast, the record reflects only doomsday predictions from Fox and varying figures of lost jobs proffered by the City without any reasoned basis. Finally, the pretextual nature of this justification is underscored by the facts that the City never chose to put programs onto Crosswalks to save a programmer's job until Ailes called on behalf of Fox News, and after Ailes' call the City did not study how the greatest number of such jobs could be so saved or created. Instead, Fox News and BIT were given a benefit unavailable to other New York City-based companies for whose programs Time Warner has not found space on its New York City cable channels.

The City next argues that, whatever the City's intentions, carrying Fox News and *1398 BIT on the City's PEG channels has no actual impact on Time Warner's independent exercise of its programming decisions. This argument has taken several forms; one of which is that Time Warner has no "standing" to make its claim because

Warner has no "standing" to make its claim because it has no First Amendment interest at stake. This argument raises the closest issue in this case. On balance, however, I am persuaded that Time Warner has carried its burden and established the necessary link between the City's actions and their impact on Time Warner's decisionmaking.

First, the powerful evidence that the City took the steps it did with the intention and, I find, belief that they would impact Time Warner's decisionmaking is in itself probative evidence that its acts will achieve their intended effect. The City's considerable efforts to influence Time Warner's editorial discretion did not suddenly cease on October 10, 1996, when it placed BIT on Crosswalks. Rather, the City's decision to place the two news programs on Crosswalks is best seen and can only properly be understood as part of its continuing effort, through means fair and foul, to prevail upon Time Warner to carry Fox News on one of its commercial channels.

Second, I find that Fox News and BIT also expect that placement on Crosswalks will significantly increase their ability to win places on Time Warner's commercial channels. The evidence is unrebutted that Fox News has no long term interest in being on Crosswalks, that it does not wish to run without advertising, and that it refused even to make a commitment to the City to run on Crosswalks without advertising past December 31 of this year.

While BIT's posture is more complicated, its long-term goals are identical to Fox's. BIT wants to be on a commercial channel, supported by advertising, and believes that a period of time on Crosswalks will appreciably increase its likelihood of achieving those goals. In contrast to Fox News, BIT is willing to make a longer-term commitment to running without advertising on Crosswalks, principally for two reasons. Since the identity of the Bloomberg enterprises is uniquely tied to financial and market news, it is particularly important that BIT be available as a twenty-four hour news service in New York City, the financial center of the country. Because of the benefits which will accrue more generally to Bloomberg from such exposure in New York City, it is prepared to be more patient than Fox. It also appears from the BIT format that its costs to run an advertising-free program with a component of some local news will be substantially less than for more traditional news programs. And thus, it will also be less expensive for BIT during the period it runs on Crosswalks.

In sum, as is true with the City, there is strong evidence

that Fox and Bloomberg believe that placement of their news programs on Crosswalks will have the effect of causing Time Warner to place the programs on one of its commercial channels. Such evidence is additional proof that the City's decision to place them on a PEG channel will achieve that goal.

The dynamics of the cable industry explain why the City's actions will have the effect of forcing Time Warner to alter its editorial decision not to carry Fox. Given the way cable consumers react to programming decisions, placing Fox News even temporarily on the Crosswalks channels will create pressure for Time Warner to accept Fox News on one of its commercial channels. Stuart J. Lipson, an independent consultant on cable television programming, testified that

[c]able carriage of virtually any programming service tends to build some degree of viewership and viewer loyalty. Once a service is added to a cable system, resistance to the removal of that service is certain to be encountered.

Thus, by playing on the Crosswalks channels, Fox News will build viewer loyalty and, when it threatens to leave Crosswalks due to the absence of advertising revenue it currently expects to leave by December 31-it will leave Time Warner with the choice of carrying Fox News on its commercial channels or angering viewers.

Moreover, by placing BIT and preparing to place Fox News on Crosswalks, the City has fundamentally changed the incentives for Time Warner in making its editorial decision *1399 about whether or not to accept Fox News on one of its commercial channels. In any negotiations, Fox and Bloomberg can claim that they have alternative market access therefore, they need not pay the premium which is ordinarily required to gain access. This change in the bargaining positions of the parties undoubtedly will affect Time Warner's decisionmaking about whether or not to grant channel space to Fox News or BIT, and on what terms.

In addition, the City's actions create a chilling effect under which Time Warner will feel pressure to capitulate to City requests that it accommodate a New York City commercial programmer who has direct access to the City Hall. In such cases, if Time Warner refuses the City's request, then the City can simply turn Crosswalks into a competing commercial system of channels.

FN36. It could be argued that there are advan-

tages to a system that allowed a City to use its channel capacity to compete with the cable operator in the commercial programming field and thereby lessen the monopoly power of the operator. There is, in fact, no bar to a City establishing or allowing competing cable systems to operate within its boundaries. Using the PEG channels for this purpose, however, is at odds with the structure established by the Cable Act and violates both Section 544(f)(1) and the First Amendment insofar as such power is used to curb an operator's freedom of decisionmaking over its commercial channels. If the City believes that Time Warner has abused its monopoly power in making programming decisions on the forty-one to forty-three or so channels in the system for which it makes such decisions, then the City has appropriate remedies to pursue. Placing Fox News and BIT on Crosswalks is not among those remedies.

Finally, on any cable system, the relevant universe from the perspective of the viewer is the total mix of programming on the system. In order to respond to what the consumer wants, Time Warner considers the programming on the cable system as a whole-including what is on the leased access channels, the must-carry broadcast stations, as well as the PEG channels-when exercising its editorial discretion about what to place on its commercial channels. Thus, insofar as the City is placing programming on Crosswalks which does not belong there, the City's decision is affecting the total mix of channels, and thereby affecting Time Warner's editorial discretion. FN37 Of course, any time the City makes a programming decision about its PEG channels it is affecting the "total mix" of programming. Therefore, making programming choices alone which affect the total mix of what is on cable is not what is inappropriate here. What the City cannot do is select a particular program to place on Crosswalks that does not belong on a PEG channel, with the specific purpose of overriding Time Warner's editorial discretion by forcing Time Warner to alter its editorial decision.

FN37. This argument is not intended to suggest that Time Warner has any right of editorial control over the City's PEG channels-as discussed above, Time Warner has no such right. The fact that Time Warner considers the total mix of programming when making its choices merely illustrates how the City's wrongful actions in misusing the PEG channels has an impact on Time

> Warner's editorial decisionmaking over its commercial channels.

[29] In sum, Time Warner has a right under the First Amendment to be free from government interference with its programming decisions. I find that the City, through its course of conduct, culminating in its decision to place Fox News and BIT on Crosswalks, has acted to compel Time Warner to add Fox News to its system of commercial channels and that these actions have had a direct, immediate, and chilling effect on Time Warner's exercise of its constitutionally-protected editorial discretion. Consequently, Time Warner has carried its burden of establishing irreparable harm. Cf. Shea on Behalf of Am. Reporter. 930 F. Supp., at 935

ii. Likelihood of Success

I now turn to whether Time Warner has established a likelihood that it will succeed in proving a violation of the First Amendment. In order to make this determination, I must first address the level of First Amendment scrutiny applicable to this case.

(a) Level of Scrutiny.

[30][31] Turner holds that content-neutral cable regulations are subject to intermediate scrutiny, and that content-based regulations are subject to strict scrutiny. See *1400 Turner. 512 U.S. at ---. 114 S.Ct. at 2459. Therefore, the key issue in determining what level of scrutiny to apply is whether the City's decision to place BIT and Fox News on its PEG channels was content-based or content-neutral.

[32] In determining whether a government action is content-neutral or content-based, a court should consider the government's purpose in taking the action. See Turner: 512 U.S. at ---. 114 S.Ct. at 2459. The City's purpose in acting to compel Time Warner to give Fox one of its commercial channels was to reward a friend and to further a particular viewpoint. As a consequence, Fox was the recipient of special advocacy. The very fact that the City chose Fox News out of all other news programs-not to mention the significant number of other programs which have been denied space on Time Warner's commercial network-is by itself substantial evidence that the City chose Fox News based on its content. As I have noted above, I find that BIT was admitted to Crosswalks as "cover" for the City's blatant content-based choice of Fox News.

It is clear that the City did not act here pursuant to any procedure for ascertaining the programming needs of the community based on content-neutral criteria unrelated to viewpoint or the identity of the owner of the proposed program. There was no study to determine how best to utilize the Crosswalks channels to further any of the City's purported goals-fuller employment, programming diversity, or reducing anticompetitive conduct. The City's actions represent just the type of viewpoint-based decision-making that the First Amendment forbids.

Indeed, illustrating the viewpoint-based nature of the City's actions, the City has argued in its brief that one of its purposes in adding Fox News and BIT to Crosswalks was to expand the "diversity of voices contributing live news" on New York's cable systems. It is not, however, permissible for the City to determine what viewpoints are not adequately represented, and then to remedy that underrepresentation by choosing who should be given access to Time Warner's commercial cable system. FN38 Cf. Rosenberger. 515 U.S. at ---. 115 S.Ct. at 2516 ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

<u>FN38.</u> This same type of analysis was used by the Supreme Court in *Mosley*, where the Court stated that

government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities.

Mosley, 408 U.S. at 96, 92 S.Ct. at 2290.

[33] In addition, I find that the City acted to punish Time Warner for exercising its editorial discretion to refuse Fox News. This punishment included placing BIT and preparing to place Fox News on Crosswalks, and linking Time Warner's decision about whether to carry Fox News on its commercial channels to both the City's approval of the Time Warner/Turner merger and to Time Warner's franchise renewal in 1998. This finding also demonstrates that the City was making a content-based decision about what news should be placed on the cable system. If the City were not engaged in content-based favoritism, it would

not have found it necessary to undertake such a significant effort to punish Time Warner for its decision. As stated in the leading treatise on cable law-a treatise cited by both parties:

Of course, if there is specific proof that any regulation is actually being used to punish an operator for a discretionary programming decision, the governmental action should be viewed as content-based.

Brenner et al., supra, § 6.03[2][c], at 6-26.

Finally, I should note that while the *Turner* Court's primary consideration for determining the appropriate level of scrutiny was whether the regulation was content-based or content-neutral, the Court also rejected using *Tornillo*'s strict scrutiny rule in part because of the government's need to protect against anticompetitive behavior by cable operators. The Court stated that

[w]hen an individual subscribes to cable, the physical connection between the television*1401 set and the cable network gives the cable operator bottleneck, or gate-keeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.

The potential for abuse of this private power over a central avenue of communication cannot be overlooked. The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.

<u>Turner. 512 U.S. at ---. 114 S.Ct. at 2466</u>. While this rationale was part of the <u>Turner Court's decision to apply intermediate scrutiny</u>, the Court made clear that it was doing so because

the must-carry provisions are not structured in a manner that carries an inherent risk of undermining First Amendment interests. The regulations are broad-based, applying to almost all cable systems in the country, rather than just a select few. As a result, the provisions do not pose the same dangers of suppression and manipulation [as other cases applying strict scrutiny]. For these reasons, the

must-carry rules do not call for strict scrutiny.

Id. at ---, 114 S.Ct. at 2468.

The regulations at issue in *Turner* were content-neutral structural regulations designed to save the broadcast networks. The City's actions in this case are very different, and thus warrant strict scrutiny. First, the City's actions are viewpoint based, which *Turner* makes clear require strict scrutiny. Second, the City's actions are not the type of broad-based "structural" regulations faced by the *Turner* Court, but rather are specifically targeted to benefit two individual speakers. Finally, the City has not engaged in any fact finding, as did Congress in justifying the "must-carry" rules.

Therefore, while I acknowledge that the potential misuse of "bottleneck" market power is implicated in this case, the response of the City was simply inappropriate. To remedy potential antitrust violations by Time Warner, the City has many options-attempting to compel Time Warner to carry a competitor through coercive actions in violation of Time Warner's constitutionally-protected editorial discretion is not one of them. Accordingly, given the evidence here of content-based decisionmaking by the City, I find that strict scrutiny applies.

(b) Applying Strict Scrutiny

In <u>Sable Communications v. FCC</u>, 492 U.S. 115, 109 S.Ct. 2829. 106 L.Ed.2d 93 (1989), the Supreme Court described the strict scrutiny standard as follows:

The Government may ... regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.... The Government may serve this legitimate interest, but to withstand constitutional scrutiny, "it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends.

<u>Id.</u> at 126, 109 S.Ct. at 2836-37 (citations omitted). Essentially, there must be (1) a compelling governmental interest; and (2) the means chosen to accomplish that interest must be narrowly tailored to that end. In undertaking this analysis, the Court may consider the alternative

means available to the government of accomplishing the same goals. Id.

[34] As noted above, the City argues that it was acting to further two interests: to ensure a wide diversity of programming, and to promote city employment. I have found that these reasons have been used here as pretexts and were not the actual motivation for the City's actions. Even if the City had *1402 been motivated by these reasons, however, and even if they are compelling, I find that the City has not narrowly tailored its actions to accomplish these goals.

[35] The City has simply failed to show that placing Fox News and BIT on the Crosswalks channels is necessary in order to further the goals of increasing the diversity of news programs or promoting City employment. In addition, there are several alternative methods by which the City could have accomplished these same goals without threatening Time Warner's First Amendment right to exercise editorial discretion over its commercial channels. For example, to protect New York City media jobs, the City could have assisted City-based media companies in any number of ways including granting tax breaks. To promote diversity of programming, the City could have negotiated a modified franchise agreement to add another franchisee to the New York area. Similarly, if the City felt that Time Warner's monopoly position was preventing needed diversity of news programming, it could have recommended an antitrust investigation of Time Warner. These alternatives would have accomplished the City's goals without intruding on Time Warner's First Amendment rights. FN39

FN39. While I hold that the City's actions are subject to strict scrutiny, I find that they would fail even under intermediate scrutiny. Under the O'Brien test, a regulation will be upheld if

it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

<u>United States v. O'Brien.</u> 391 U.S. 367, 377. 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968). See also <u>Ward v. Rock Against Racism.</u> 491 U.S. 781, 798-800, 109 S.Ct. 2746, 2757-59, 105 L.Ed.2d 661 (1989). The regulation "need

not be the least restrictive or least intrusive means of doing so." Ward. 491 U.S. at 798. 109 S.Ct. at 2757-58. "Narrow tailoring in this context requires, in other words, that the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests." Tunner, 512 U.S. at ---. 114 S.Ct. at 2469 (quoting Ward).

Here, viewpoint favoritism and speaker preference, which were the City's true motivations, can hardly be characterized as legitimate government purposes, "unrelated to the suppression of free expression." O'Brien. 391 U.S. at 377. 88 S.Ct. at 1679. In addition, for the reasons the City's actions fail strict scrutiny, they also fail intermediate scrutiny.

[36][37] I must address one last issue. The City argues that its First Amendment right to speak would be infringed by the issuance of a preliminary injunction in this matter. In addition, as noted above, under Section 531(e) Time Warner may not interfere with the City's programming decisions for the PEG channels. Fox and Bloomberg also assert that they have First Amendment interests which would be injured if this Court issues an injunction. According to the City, Fox, and Bloomberg, an injunction would act as a prior restraint on their speech.

I acknowledge the complex nature of the competing First Amendment interests at stake here. Fox and Bloomberg as cable programmers clearly have a First Amendment right to speak. The public has a First Amendment interest in a wide range of information. Moreover, the City has a statutory right-and, it argues, a First Amendment right-to determine what programming to place on its PEG channels. I need not decide, however, whether municipalities have First Amendment rights, because I find that even assuming the City does have such rights, and despite the unquestioned existence of the rights of Fox and Bloomberg, this argument must fail.

The City cannot wield its own First Amendment right as a sword to force Time Warner to capitulate to the City's demands, and then claim that same First Amendment right as a shield preventing this Court from granting relief. As to the First Amendment rights of Fox and Bloomberg, their deprivation is due to the City's violation of its First Amendment obligations as a state actor, and thus is incidental. As discussed above, the City had no

right under the Cable Act or the franchise agreements to place their programs on Crosswalks in the first instance.

In sum, the City's actions fail strict scrutiny. Accordingly, I find that Time Warner has shown a likelihood of success on the merits of its claim that the City has violated *1403 its First Amendment right to exercise editorial discretion.

IV. Conclusion

The City has engaged in a pattern of conduct with the purpose of compelling Time Warner to alter its constitutionally-protected editorial decision not to carry Fox News. The City's actions violate longstanding First Amendment principles that are the foundation of our democracy. As the Court stated in *Turner*:

At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal. Government action that ... requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to ... manipulate the public debate through coercion rather than persuasion.

Turner: 512 U.S. at ----, 114 S.Ct. at 2458.

In many instances the First Amendment has been invoked to protect the interests of those whose ideas are unpopular or even repugnant. Here the First Amendment is invoked by a powerful commercial enterprise with substantial resources to respond to the government's actions. Even though the government's power is nearly matched by that of its commercial adversary, in order to protect the values embodied in the First Amendment, we nevertheless must be vigilant against the abuse of governmental power present here.

Having found that Time Warner has carried the burden that applies at this preliminary proceeding and that it has sufficiently established that the City of New York violated Time Warner's rights under Section 544(f)(1) of the Cable Act and under the First Amendment of the United States Constitution, I preliminarily enjoin the City from placing Fox News and BIT on its Crosswalks channels in a manner inconsistent with this Opinion. Time Warner shall submit a proposed order on notice within seven

days.

SO ORDERED.

S.D.N.Y., 1996.

Time Warner Cable of New York City, a Div. of Time Warner Entertainment Co., L.P. v. City of New York 943 F.Supp. 1357, 5 Communications Reg. (P&F) 484

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